

Binding the EU to International Human Rights Law

Israel de Jesús Butler and Olivier De Schutter***

I. Introduction

For almost 40 years, human rights have received protection within the legal order of the European Union (EU). Despite the absence of any specific mandate in the Treaties, the European Court of Justice (ECJ) took the initiative of developing these rights as general principles of Community law as part of its attempt to establish the legitimacy of EC law and its claim to supremacy in the face of objections from the constitutional courts of certain Member States.¹ This development was subsequently endorsed by the other institutions of the EU (then still the European Communities),² and, following the Treaty of Maastricht on the European Union, by the Member States themselves.³ In 2000, the EU raised the visibility of the human rights *acquis* for its citizens by proclaiming a Charter of Fundamental Rights.⁴ The Charter has undoubtedly brought about a shift in the culture of the institutions of the Union. The European Parliament now systematically checks whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles of the Charter.⁵ The Commission announced its intention to verify the compatibility of its proposals with the Charter in 2001.⁶ In 2005, it adopted a Communication clarifying the methodology it

* City Solicitors' Educational Trust Lecturer in EU Law at Lancaster University.

** Professor at the University of Louvain (UCL) and at the College of Europe (Natolin); Visiting Professor, Columbia University (2007–08).

¹ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125.

² Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms [1977] OJ C103/1 (27.04.77).

³ See Article 6(2) of the Treaty on European Union (TEU) ([2002] OJ C325 (24.12.02).

⁴ The Charter was solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000 [2000] OJ C364/1 (18.12.2000).

⁵ See Article 34 of the Rules of Procedure of the European Parliament, 16th edn, July 2006, available online at: <<http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+RULES-EP+20060703+0+DOC+PDF+V0//EN>>.

⁶ SEC(2001) 380/3.

would use for this purpose.⁷ The revised guidelines for the preparation of impact assessments now pay greater attention to the potential effects of different policy options on the guarantees in the Charter.⁸ The Reform Treaty, signed at Lisbon on 13 December 2007, will contain a reference to the Charter—in the amended form in which it was proclaimed on the same day—thus confirming its status as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law.⁹

These developments are both important and welcome. It is not our purpose here, though, to describe them in any detail. Nor shall we seek to illustrate their shortcomings insofar as they seek to ensure that, within the legal order of the EU, fundamental rights will not be violated. Overall, as a result of this impressive list of achievements, the Union clearly deserves to be seen as a model for other international organizations.¹⁰ We note, however, that these developments remain internal to the Union. They do not result in any form of external supervision being exercised over the Union's institutions. And they are related to, but not in any way dependent on, the international human rights treaties to which the Member States are party.¹¹ The most optimistic of observers might consider these developments as paving the way towards greater recognition by the Union that it is bound to comply with international and European human rights law. However, there exist several problems with this view. Firstly, the Charter of Fundamental Rights does not necessarily replicate the breadth of rights protected by the range of human rights treaties to which the Member States are already party. Thus, there is a risk that even if the institutions are effective in ensuring that legislative proposals do not violate the rights contained in the EU Charter of Fundamental Rights, they may still conflict with other rights that the Member States have undertaken individually to guarantee. Secondly, the approach of the Union institutions to human rights is purely negative. They admit that EU law should

⁷ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

⁸ SEC(2005)791, 15.6.2005. Although the new guidelines are still based, as the former impact assessments (see Communication of 5 June 2005 on Impact Assessment, COM(2002)276), on a division between economic, social, and environmental impacts, the revised set of guidelines, fundamental rights are included under these different rubrics. Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

⁹ Article 6(2) of the TEU, as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 ([2007] OJ C306/1 (17.12.07)) (referring to the EU Charter of Fundamental Rights in the revised form it has been proclaimed, in a revised form, on 12 December 2007 ([2007] OJ C303/1 (14.12.07))).

¹⁰ See eg with regard to human rights obligations on the UN, A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, 2006) 109–137.

¹¹ The term 'international human rights treaty' should be taken to refer to a treaty that sets out a series of human rights parties are under a duty to guarantee. In general most human rights treaties will derive from (and often expand on) the catalogue of rights set out in the UN's Universal Declaration of Human Rights, 1948 (GA Res 217 A (III), 10.12.48).

not violate human rights standards, but they refrain from imposing a duty on the institutions to undertake activities that promote and protect human rights. Thirdly, there exists a significant risk that nurturing human rights standards in isolation from the standards that develop, evolve, and crystallize under the supervision of the United Nations and Council of Europe may be counter-productive. Such a situation may lead the institutions of the Union to develop their own standards, marginalizing the pre-existing *acquis* binding on its Member States, and potentially resulting in a lowering of the level of protection of human rights in the policy domains transferred to the Union.

In this article, we make the case for placing the Union under the supervision of United Nations and Council of Europe monitoring bodies. We present a variety of mechanisms through which such supervision could be organized. We share the optimistic view that, in time, this development is inevitable: the more the Union comes to share the attributes of a sovereign State, the more it shall have to enter into the kinds of agreements through which, like its Member States themselves, it will commit itself to the promotion and protection of human rights in all matters falling under its jurisdiction. If the Union is to be truly 'founded' on human rights then these must be the same rights as those to which all or most of its Member States have committed themselves through the United Nations and the Council of Europe. However, there is no time to lose in this: for as long as the Union fails to recognize that it must comply with international human rights law and submit to the supervisory mechanisms established under the relevant instruments, it exposes its citizens to the inadequacies of the lesser protection available in its internal regime. The propagation of separate human rights regimes for the Union and the Member States will create confusion among the latter as to the scope of their obligations and may provide them with a pretext for ignoring their international undertakings in the areas in which they have transferred powers to the Union.

This article will, firstly, highlight the need for external international supervision of the Union by explaining the current shortcomings of human rights protection at the internal level. We argue that the failure of the European Union to recognize its obligations under the international law of human rights leads to an interpretation of human rights which is narrower than that already accepted by its Member States and third States; that it creates difficulties for the uniform application of EU law; and that it may result, finally, in a lowering of the level of protection for individuals. Second, we explore the different techniques by which the Union could strengthen its links to the human rights standards developed within the United Nations or the Council of Europe. We examine the possibility of accession by the EU to international or European human rights instruments. We also review alternatives to accession, namely supervision of the European Union by the relevant monitoring bodies established under those instruments even in the absence of formal membership of those Treaties. Before concluding we suggest how the Union could comply with international human rights law despite lacking a general competence to protect and promote human rights.

II. The Shortcomings of the Current Internal EU Human Rights Regime

In the current state of EU law, fundamental rights are protected by the ECJ, through the vehicle of the general principles of law which the Court ensures respect for on the basis of Article 220 of the EC Treaty. Inspiration for the general principles is to be drawn from treaties to which the Member States are party, in particular the European Convention on Human Rights, and the constitutional traditions of the Member States. This development in the case law was subsequently recognized in the EU Treaty (Article 6(2)) which mandates the Union to 'respect' human rights as embodied in the general principles. More recently, the EU Charter of Fundamental Rights sets out what the Member States consider to reflect the current *acquis* of rights, freedoms, and principles that the EU is bound to observe. As confirmed most recently by the Preamble to the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom: 'the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but does not create new rights or principles'. The Charter was to make visible the existing *acquis* of the Union in this field; it was not to invent a new catalogue of rights.

As a result of this evolution, the general principles of law, developed by the ECJ on the basis of the international human rights treaties to which the Member States are parties or on which they have collaborated and of the constitutional traditions common to the Member States, co-exist with the EU Charter of Fundamental Rights as two separate sources of human rights in the EU legal order. The Charter does not purport to 'freeze' the expansion of the body of substantive human rights accepted in EU law. The ECJ is entitled to develop these principles beyond what the Charter expressly recognizes, where a particular right fits the required criteria, as the bodies of international or domestic human rights law evolve. This much can be derived from Article 6(3) of the EU Treaty as amended by the Reform Treaty, along with Article 53 of the Charter.¹² However, even if the ECJ is free to expand the substantive body of recognized general principles, the Reform Treaty does not empower the Court to further expand the scope of application of EU law. Implicit in this is the view that human rights obligations are

¹² According to Article 6(3) of the EU Treaty, the Union is bound to respect fundamental rights 'as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States', as general principles of Union law. Article 53 of the Charter reads: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions' (emphasis added).

negative in nature: human rights, as embodied in the general principles, must be respected when the institutions of the Union or the Member States implementing Union law adopt certain measures. The Charter does not expand the competence of the EU; nor does it permit the Court to require the EU to take positive action to promote the standards it contains.¹³

There are three limits to these developments of the emerging system of protection of human rights in the EU. First, while the potential exists to expand the body of rights accepted by the ECJ to reflect developments in international and domestic law, we note that the Court has ignored a large body of international human rights treaties to which the Member States are party. This is difficult to justify in principle and may threaten the uniform application of EU law. We suggest, instead, that all human rights treaties to which Member States are party—even those not ratified by all the Member States—should be taken into consideration as if these treaties were binding upon the Union itself. Second, we note that if the ECJ bases itself in international human rights law, it will be obliged to adopt the internationally accepted doctrine that human rights may impose positive as well as negative obligations. Human rights should not simply be seen as limits on which measures the EU may adopt. Rather, the protection and promotion of human rights should be seen as objectives to be achieved by the exercise of the competences which have been conferred upon the Union. Third, we note that grounding the Union's human rights regime in internationally recognized standards should lead the EU to cooperate with the monitoring bodies established under those treaties and make use of their findings.

A. The Court's Use of International Human Rights Instruments

When asked to identify certain fundamental rights as worthy of protection, the ECJ currently examines whether the right in question is included, either in the European Convention on Human Rights, whose 'special significance' it has long recognized in its case law,¹⁴ or in another international instrument for the protection of human rights which the Member States have all agreed to. The canonical formula used by the Court is that it 'draws inspiration [...] from the guidelines supplied by international instruments for the protection of human rights on

¹³ See the Declaration concerning the Charter of Fundamental Rights of the European Union appended to the Reform Treaty.

¹⁴ Case C-260/89 *ERT* [1991] ECR I-2925, para 41; Opinion 2/94 *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para 33; Case C-274/99 P, *Connolly v Commission* [2001] ECR I-1611, para 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 71; Case C-36/02 *Omega* [2004] ECR I-9609, para 33. Article 6(2) of the EU Treaty only refers to the European Convention on Human Rights, neglecting a reference to other human rights treaties to which the Member States have collaborated on or signed (an omission retained by the Reform Treaty in Article 6(3) of the EU Treaty, as amended).

which the Member States have collaborated or to which they are signatories'.¹⁵ In practice, however, its use of sources other than the European Convention on Human Rights has been parsimonious and selective. The 1966 International Covenant on Civil and Political Rights (ICCPR) has been put before the ECJ as a source of inspiration for recognizing a general principle on several occasions.¹⁶ While the Court superficially recognizes its significance it has not been possible to find a case where it has actually relied upon its provisions.¹⁷ In the *Grant* case, it went so far as to deny the significance of a decision on the merits of a case delivered by the UN Human Rights Committee (HRC) which accepted that discrimination on the basis of sex contained in the ICCPR could include discrimination on the basis of sexual orientation.¹⁸ Perhaps the furthest that the ECJ has come to drawing on other instruments has been in its decision of *Parliament v Council*¹⁹ where the European Parliament was seeking to annul certain provisions of the 2003 Family Reunification Directive.²⁰ The Court noted that:

... the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. [...] That is also true of the Convention on the Rights of the Child [...] which, like the Covenant, binds each of the Member States.²¹

The Court went on largely to rely on Article 8 of the European Convention on Human Rights and the accompanying case law of the European Court of Human Rights concerning family reunification. It made no further reference to the ICCPR. While the Court did draw on the Convention on the Rights of the Child (CRC)²² this only occurred once in the decision and only as a means of supplementing its consideration of the European Convention on Human Rights. Arguably the CRC only received consideration because, unlike the European Convention on Human Rights, it deals extensively with the rights of the child. Given this Treaty's significance (it has 193 parties, with only USA and Somalia not having ratified it)²³ and the fact that the European Court of Human Rights itself draws on its provisions²⁴ one might have expected the ECJ to make greater

¹⁵ Case 4/73 *Nold KG v Commission* [1974] ECR 491. The wording has not evolved greatly. See eg Case C-94/00 *Roquette Frères* [2002] ECR I-9011.

¹⁶ 999 UNTS 171.

¹⁷ Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621, para 44 relating to ICCPR, Art 2(1); Case C-60/92 *Otto BV v Postbank NV* [1993] ECR I-5683, para 11 relating to ICCPR, Art 14; Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 31 relating to ICCPR, Art 14.

¹⁸ *Grant*, *ibid*, para 46.

¹⁹ Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

²⁰ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ([2003] OJ L251/12).

²¹ Paragraph 37 of the judgment. ²² 1577 UNTS 3 (signed on 20 November 1989).

²³ See 'Multilateral Treaties Deposited with the Secretary-General' (ST/LEG/SER/E/19), or: <<http://www.ohchr.org/english/countries/ratification/4.htm>>.

²⁴ See eg European Court of Human Rights *Mayeka & Mitunga v Belgium* Application no 13178/03, 12.10.06, where the European Court of Human Rights drew on the CRC in a case concerning family reunification.

use of the Treaty. Furthermore, the Court completely dismissed the significance of the 1961 European Social Charter (ESC) despite the several provisions it contains of direct relevance to the issues raised in the case and the fact that all the Member States are party to the original 1961 Treaty.²⁵ The ECJ appears to have altered its dismissive attitude towards the ESC in the *Laval* and *Viking* cases decided in December 2007, where it accepted 'the right to take collective action, including the right to strike', as part of the general principles of Community law, since it is 'recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter... to which, moreover, express reference is made in Article 136 EC—and [ILO] Convention No 87 concerning Freedom of Association and Protection of the Right to Organise [of 1948]... and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers [of 1989], which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union'.²⁶ What led to this change of opinion concerning the status of the European Social Charter is not stated.

Several observations on the approach of the Court can be made. First, despite occasionally acknowledging the relevance of treaties other than the European Convention on Human Rights, it has been extremely rare for the ECJ to draw on any other instrument. What emerges from the cases is that the Court will rely primarily on the European Convention on Human Rights and while it may draw on other treaties to complement its analysis (*Parliament v Council*), it may not draw on them where they appear to go beyond the European Convention on Human Rights (*Grant*), except where there appears to be some support for this in the EC or EU Treaty (*Laval* and *Viking*). The two occasions when it has relied on other treaties—in relation to the CRC and the ESC—may either be considered exceptional, or signal an evolution in the Court's practice. These cases have in common that the rights referred to in the CRC and the ESC were also contained in the Charter of Fundamental Rights. It may be that the Court, therefore, will

²⁵ CETS 035. See Articles 7, 16, 17, and 19 of the ESC. As to the ESC, it stated (at para 107): 'So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter'. The Joint Opinion of AG Jacobs (delivered 18.1.99, at para 146) in the *Albany*, *Brentjens*, and *Drijvende Bokken* cases (which dismisses the legal value of the ESC) may offer some explanation for the Court's attitude. The Court itself expressed no view on this in its decisions. (Case C-67/96 *Albany International BV* ECR [1999] I-5751; Joined Cases C-115/97, C-116/97, and C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] I-6025, and Case C-219/97 *BV Maatschappij Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* ECR [1999] I-6121.)

²⁶ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, n.y.r., para 43 (judgment of 11 December 2007); and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, n.y.r., para 90 (judgment of 18 December 2007). See in particular the seemingly decisive Opinion of AG Mengozzi, para 78.

begin to move beyond the European Convention on Human Rights, but may only undertake audacious sorties into international human rights law under cover of the Charter. Even if this emerges to be the case, hitherto the Court has relied on treaties other than the European Convention on Human Rights either not at all or sporadically. Two problems result from this situation. First, as they are currently developed in an incremental manner by the ECJ the fundamental rights included among the general principles of law it ensures respect for are detached from international human rights law. Second, the selectivity of the ECJ in its references to international human rights treaties constitutes a potential threat to the uniform application and supremacy of Union law.

B. The Dissonance between Union Law and International Human Rights Law

As we have seen, the European Convention on Human Rights while it has accorded a 'special significance' to the European Convention on Human Rights, the Court has comparatively neglected other international human rights instruments—even those to which all its Member States are party. As illustrated above by the Court's treatment of the case law of the HRC in the *Grant* case, the ECJ has been reluctant to go beyond the guarantees established in the European Convention on Human Rights and the case law of the European Court of Human Rights when developing the general principles of law. In contrast, there is no shortage of cases illustrating the willingness of the ECJ to study the details of the case law of the European Court of Human Rights in order to apply the European Convention on Human Rights in accordance with that authoritative interpretation.²⁷ Nevertheless, the Member States are all party to a significant number of human rights treaties created under the aegis of the UN, apart from the ICCPR and the CRC. These are, in particular, the 1966 International Covenant on Economic, Social and Cultural Rights;²⁸ the 1965 International Convention on the Elimination of All Forms of Racial Discrimination;²⁹ the 1979 Convention on the Elimination of All Forms of Discrimination Against Women;³⁰ and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³¹ Why the Court does not rely systematically on these instruments is unclear, given that they satisfy the criteria of the Court for 'discovering' general principles of law. Quite apart from a consistent neglect of these international instruments which all the Member States have collaborated on and joined, the *Grant* decision in particular underlines the lack

²⁷ For a detailed analysis, see O De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes', in G Cohen-Jonathan and J Fr Flauss (dir), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme* (Bruylant-Nemesis, 2005) 189–242.

²⁸ 993 UNTS 3.

²⁹ 660 UNTS 195.

³⁰ 1249 UNTS 13.

³¹ 1465 UNTS 85.

of faith that the Court places in the interpretations of international human rights law issued by the monitoring bodies responsible for supervising the correct implementation of these treaties. In dismissing out of hand the case law of the HRC, the Court stated that it 'is not a judicial institution' and that its findings 'have no binding force in law'.³² This understanding of the role of the Human Rights Committee ignores the generally accepted view that the UN monitoring bodies exercise a 'quasi judicial' function,³³ and that their interpretation of the treaties they are tasked to supervise should be treated as authoritative. Even though the parties have not expressly undertaken to regard the decisions of these bodies as legally binding, they are not without legal weight.³⁴ The Court further noted that the HRC's understanding of sex discrimination to include discrimination on the basis of sexual orientation 'does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights'.³⁵ This illustrates a failure to appreciate the nature and status of the ICCPR as well as the role of the HRC. In a very real sense, international human rights law is what the HRC and the other UN monitoring bodies say it is. The UN Charter, which obliges its members to promote and protect human rights, does not attempt to elaborate the meaning of 'human rights' and instead relies on separate treaties to give the term concrete meaning.³⁶ However, the UN sponsored human rights treaties noted above represent the legally binding expression of human rights as they feature in the UN Charter, to which all the

³² Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621, para 47.

³³ Traditional judicial dispute settlement is understood to refer to dispute settlement by a body of formally elected judges on the basis of evidence submitted by the parties, including the examination and cross examination of witnesses in oral hearings and the delivery of a judgment with which the parties have expressly committed themselves to comply. Quasi-judicial dispute settlement refers to dispute settlement by a body of independent experts who consider the evidence and arguments of the parties by reference to law (though does not necessarily hold oral hearings) and delivers findings which states have not expressly accepted as binding. See H Steinberger, 'Judicial Settlement of International Disputes', in R Bernhardt (ed), *Encyclopaedia of Public International Law* (Max Planck, 1981) 120; H Steiner, 'Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?', in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), 15, 29–30.

³⁴ The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have stated that by consenting to the individual petition procedure, the State parties to the respective treaties have agreed to act upon their findings as to the existence *vel non* of a violation. 'Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party... information about the measures taken to give effect to the Committee's Views.' See eg HRC: *Sooklal v Trinidad and Tobago* Communication no 928/2000, para 7. Similarly, CERD: *LR v Slovakia*, Communication no 31/2003.

³⁵ *Grant* case (n 32 above), para 47.

³⁶ In particular, see UN Charter, Arts 55 and 56.

EU Member States have committed themselves.³⁷ It is the monitoring bodies of these treaties that are charged with explaining their meaning. The International Court of Justice,³⁸ but also increasingly national courts³⁹ and regional human rights protection bodies, including the European Court of Human Rights,⁴⁰ the Inter-American Court⁴¹ and Commission of Human Rights,⁴² and the African Commission on Human and Peoples' Rights,⁴³ base their understanding of human rights law on the interpretations given by these monitoring bodies. By continuing to ignore the significance of international human rights law the ECJ threatens the coherence and universality of human rights protection.

On this precise point, we may be currently witnessing an evolution in the position of the members of the European Court of Justice. In her opinion in *Parliament v Council* (discussed above) on the Family Reunification Directive,⁴⁴ AG Kokott refers explicitly to the case law of the European Committee of Social Rights, as a means of clarifying the meaning of the provisions of the ESC. However, this attitude remains exceptional and it is far from clear whether it will be followed by the judges themselves. Despite a Memorandum of Understanding now concluded between the Council of Europe and the EU, providing that reference should be made by the EU to case law elaborated in the context of the Council

³⁷ See eg ICCPR Preamble: 'The States Parties to the present Covenant . . . Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . . Agree upon the following Articles . . .'

³⁸ See eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep 2004, 136, at paras 109 and 112 where the ICJ interpreted the ICESCR and other UN human rights treaties by reference to views of their monitoring bodies. This attitude is unlikely to change in the future, especially considering that influential members of the International Court of Justice, such as its president Ms R Higgins and Mr B Simma, have been members of UN human rights treaty bodies.

³⁹ On the influence of the case law, including views adopted on individual communications, general comments, and concluding observations, of the UN human rights treaty bodies, see Committee on International Human Rights Law and Practice of the International Law Association, *Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, adopted at the 2004 Berlin Conference; and H Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies. A Comparative Study* (Institute for Human Rights, Abo Akademi University, December 2003), available online at: <<http://www.abo.fi/institut/imr/norfa/Heli.pdf>> (examining the national implementation of UN treaty body findings, including final views, concluding observations, and general comments, in Australia, Canada, the Czech Republic, Finland, Spain, and Sweden). See also, more generally, C Heyns and F Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002).

⁴⁰ See eg *Ergin v Turkey* (No 6), 4/5/06, Application no 47533/99, paras 22–24.

⁴¹ See eg *Case of the 'Juvenile Re-education Institute' v Paraguay*, 02/09/04, IACtHR Series C 112, para 161.

⁴² See eg *Pinder v The Bahamas*, 15/10/07, IACommHR, Case 12.513, Report 79/07, paras 28–30.

⁴³ See eg *Legal Resources Foundation v Zambia* ACHPR, Communication no 211/98 (2001), paras 59, 63 and 70.

⁴⁴ Case C-540/03 *Parliament v Council* [2006] ECR I-5769. See para 74 of the opinion (after mentioning Article 19(6) of the ESC, which concerns the right to family reunification for migrant workers, AG Kokott refers to the fact that 'the European Committee of Social Rights, which supervises the implementation of the Social Charter, has to date, in its rulings, only accepted waiting periods of up to one year, and has rejected waiting periods of three years and more').

of Europe when developing human rights standards,⁴⁵ it is highly unlikely that the Court itself will engage in this practice. Prospects are even dimmer, of course, as regards other human rights monitoring bodies, established under UN human rights treaties or within the International Labour Organization (ILO).

Thus, the second problem to be highlighted is that the current approach of the ECJ to the incorporation of human rights standards within the general principles of law risks taking the EU down a path where the protection of human rights is not only narrower than the standards already recognized by the Member States through their treaty commitments, but also inconsistent and out of touch with the interpretations of recognized rights given by the monitoring bodies and applied and followed by national and international courts.

C. The Uniformity and Supremacy of EU Law vis-à-vis the Member States' International Undertakings

If the protection that the ECJ accords to human rights does not follow that which the Member States have individually undertaken in their treaty commitments, then inevitably action mandated by the EU will come into conflict with Member States' commitments under these treaties. This may raise a significant problem for the supremacy of EU law. If the ECJ fails to ensure respect for the rights contained in these treaties the national jurisdictions may decide—as they have in the past in relation to human rights guaranteed within their constitutions—that EU law must be 'disapplied' to the extent that compliance with these human rights obligations is required.⁴⁶ Nonetheless, even if the ECJ, for instance, were to incorporate into the general principles of Community law the idea that Member States were permitted on an individual basis to accord human rights higher standards

⁴⁵ Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10–11 May 2007, CM(2007)74 (10 May 2007) (hereinafter referred to a 'Memorandum of Understanding').

⁴⁶ This would follow if one were to accept the approach adopted by the Court of First Instance in the *Yusuf and Kadi* cases that human rights obligations deriving from the UN Charter take priority over EU law, and might be seen to follow from Articles 56 and 103 of the UN Charter. Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01 *Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533. On appeal, the ECJ, while it did not seem to go so far as the Court of First Instance, hypothesized that obligations derived from the UN Charter might take precedence over provisions of secondary EU legislation, but not primary legislation. Included in primary legislation were human rights as guaranteed by the general principles of Community law. See Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* judgment of 3 September 2008 (not yet published), paras 301–308. On the relationship of EU to the international law of human rights, see further Ahmed and Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *European Journal of International Law* 771. For a discussion on the difficulties relating to diverging standards of human rights protection within the national law of individual Member States and how national courts determine priority between laws protecting human rights and obligations under Community law, see Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in The European Union' (1998) 35 *CML Rev* 629, 632–664.

of protection than recognized by the EU this would maintain the illusion of supremacy but sacrifice uniformity.⁴⁷ Conversely, in order to observe their obligations under EU law, States may be forced to ignore the obligations imposed on them under human rights treaties or ultimately to withdraw from such treaties. This situation is compounded in relation to those human rights treaties which are ratified only by some of the Member States. If, as its current case law would seem to suggest,⁴⁸ the ECJ is reluctant to make reference to such treaties, such situations could become more frequent in the future.

This problem may be approached as follows. Although all the Member States are currently party to a significant body of human rights treaties, not all of them were parties to these treaties before they joined the EU. Where a Member State has a conflict between EU law and other treaty commitments, the EC Treaty only allows deference to those treaty commitments where they were entered into before joining the Union. This is the case, for instance in relation to the ICCPR where only 18 of the current Member States were party before acceding to the EU.⁴⁹ Similarly, a number of Member States were parties to the Council of Europe Framework Convention on the Protection of National Minorities (Framework Convention) before joining the EU, but others joined later (e.g. the UK) and others still have not joined at all (e.g. Belgium, France, and Greece).⁵⁰ The relationship between Member States' commitments under EC law and their pre-existing international obligations is dealt with under Article 307 of the EC Treaty which reads:

The rights and obligations arising from agreements concluded before... the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty... To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.⁵¹

There are two notable features of Article 307. First, where a Member State comes to the EU with pre-existing commitments, the EU cannot require those Member

⁴⁷ Besselink, *ibid*, 674–678. He terms this the 'local minimum standard'.

⁴⁸ For instance, the Opinion of AG Kokott in *Parliament v Council* (note 44 above) stated (in para 76) that the Council of Europe Convention on Migrant Workers should not be taken account because at the time it had only been ratified by some Member States.

⁴⁹ Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. Seven of the remaining nine MS were all parties to the ICCPR by 1983, with Ireland and Greece acceding to the ICCPR in 1989 and 1997 respectively. See 'Multilateral Treaties Deposited with the Secretary-General' (ST/LEG/SER/E/19), or: <<http://www.ohchr.org/english/countries/ratification/4.htm>>.

⁵⁰ CETS 157. The treaty has 39 parties. For the status of ratifications, see: <<http://conventions.coe.int/>>.

⁵¹ The ECJ has noted that this provision does no more than recognize the consequences, for the institutions of the Union, of the general public international rules on the conclusion of successive treaties: Case 10/61 *Commission v Italy* [1962] ECR 1.

States to default on their obligations to third States.⁵² However, the Court has underlined that the ‘duty of the Community institutions is directed only to permitting the member State concerned to perform its obligations under the prior agreement *and does not bind the Community as regards the non-member country in question*’.⁵³ This was recently reaffirmed by the Court of First Instance in the *Kadi* and *Yusuf* judgments with regard to compliance with Security Council Resolutions 1267 (1999), 1333 (2000), and 1390 (2002) obliging all UN members to execute certain restrictive measures against suspected members of the Al-Qaeda network and the Taliban.⁵⁴ Thus while the EU may not create obstacles to compliance by its Member States with pre-existing international obligations which they remain bound by, and which they may not derogate from simply by joining the EU, the EU itself is not bound vis-à-vis third parties in the international legal order. This creates an obvious problem: where an international human rights treaty imposes on a Member State obligations which cannot be reconciled with its obligations under EU law, compliance with these treaties may require a Member State to default on its obligations under EU law thus threatening the uniform application of EU law. This may result in obstacles to the establishment of, for instance, the internal market or to the area of freedom, security, and justice. EU law does allow a Member State to invoke its obligation to protect human rights, in order to impose restrictions on economic freedoms recognized under the EC Treaty.⁵⁵ In principle, such exceptions are only acceptable to the extent that the fundamental rights invoked are recognized as part of the EU legal order, among the general principles of law developed by the ECJ—which, we have seen, are drawn almost exclusively from the European Convention on Human Rights. There are borderline situations of course, for instance where—as in the *Omega Spielhallen* case of 2004⁵⁶—national authorities invoke the particular significance they attach to a right, such as the right to human dignity, of

⁵² The ECJ stated that Article 307 of the EC Treaty implied ‘a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement’: Case 812/79 *Attorney General v Burgoa* [1980] ECR 2787, at para 9.

⁵³ *Ibid* (emphasis added). See also, for a reaffirmation of this statement, Case T-184/95 *Dorsch Consult v Council and Commission* [1998] ECR II-667, para 74. For other examples where Article 307 of the EC Treaty was invoked, see Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, para 27; Case 10/61, *Commission v Italy* [1962] ECR 1; Case C-158/91 *Levy* [1993] ECR I-4287; and Case C-124/95 *Centro-Com* [1997] ECR I-81, para 56.

⁵⁴ See *Kadi*, para 192 and *Yusuf*, para 242 (CFI judgments), n 46, above. The CFI had to address the question whether the EU was bound to contribute to the implementation of the sanctions decided by the UN Security Council, under the resolutions referred to above. This was confirmed on appeal by the ECJ (n 46, above at paras 278–280) in so far as it affirmed that the Resolutions of the Security Council—while retaining their primacy in general international law—did not automatically bind the EU’s institutions, nor oblige its Member States to act through the EU to implement them. Furthermore the disputed Resolutions could neither exclude the jurisdiction of the Court nor take precedence over primary EU legislation, including the general principles of law guaranteed by the ECJ.

⁵⁵ See eg Case C-368/95 *Familiapress* [1997] ECR I-3689 (para 24).

⁵⁶ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I-9609.

which different understandings coexist within the EU. But even in those cases, the specific national measure adopted in order to protect the value at stake will only be considered acceptable if the said value is shared among the different EU Member States, as would be demonstrated, for instance, by its inclusion in the EU Charter of Fundamental Rights.⁵⁷ In contrast, allowing a Member State to invoke, on a permanent basis, the need to ensure protection of a right included in an international agreement binding upon that State, but which is not part of the set of rights recognized among the general principles of law, would create a potentially threatening precedent for the uniform application of EU law.

The second feature of Article 307 is that where incompatibilities between EU and pre-existing human rights obligations are recognized to exist the Member States must take 'appropriate steps' to eliminate this incompatibility. This may necessitate the withdrawal by Member States from the human rights treaty in question. We have seen in the past instances where Italy and France have denounced ILO Conventions which conflicted with the requirements of gender equality under EC law.⁵⁸ But these were exceptional situations where the said conventions were based on the paternalistic approach to the protection of women typical of the first half of the twentieth century, rather than on the equal opportunities approach espoused under both EC law and international human rights law in the more recent period. It seems unthinkable, in contrast, that the Member States who are parties to the Framework Convention (noted above) would be obliged under EU law to denounce that instrument, for instance because the adoption of certain measures intended to protect and promote the rights of minorities would be considered to be in violation of the requirements of fundamental economic freedoms under the EC Treaty. In addition, it would prove politically embarrassing for the EU in its relations with third States targeted by the EU for human rights violations or where the EU imposes observance of human rights as conditions for

⁵⁷ See paragraph 34 of the judgment delivered in the *Omega* case: '... the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.'

⁵⁸ In Case C-158/91 *Lévy* [1993] ECR I-4287, the Court admitted that Article 234 EEC (now Article 307 of the EC Treaty, after amendment), could be an obstacle to sanctioning the State party to that Convention for not respecting Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ([1976] OJ L39/40), on the point where an incompatibility existed. See on this point the Opinion of Tesouro AG of 16 January 1997 in Case C-197/96 *EC Commission v France* [1997] ECR I-1491, at 1491–1495. It is clear however that there is an obligation imposed on the EU Member States to remove the incompatibility—if necessary, by denouncing the pre-existing agreement—as soon as they have the opportunity to do so. See Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, and, in the literature, Manzini, 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law' 12 EJIL (2001) 781. France, for instance, denounced ILO Convention (No 89) of 9 July 1948 concerning Nightwork of Women Employed in Industry, in order to comply with Directive 76/207 (see Case C-345/89 *Stockel* [1991] ECR I-4047, and Case C-197/96 *Commission v France* [1997] ECR I-1489).

trade agreements.⁵⁹ Furthermore, the UN HRC has maintained that, absent an explicit provision to that effect, withdrawal from human rights treaties is, in fact, illegal or at least impossible, since human rights guarantees entered into by States devolve permanently to the national territory and the population.⁶⁰

The scenario of a conflict between obligations under the Framework Convention and obligations under EU law is not purely hypothetical, as two examples may illustrate. Article 3(1) of Regulation 1612/68 on freedom of movement for workers⁶¹ prohibits national rules, which ‘though applicable irrespective of nationality, [have as] their exclusive or principal aim or effect... to keep nationals of other Member States away from the employment offered’. It further provides that this provision is not to ‘apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled’. In the *Groener* case the ECJ considered the legality of Irish domestic law restricting eligibility for certain teaching positions to individuals with an adequate knowledge of the Irish language. On the facts, the ECJ accepted the validity of the Irish rule. In view of the policy it pursued for the promotion of the Irish language, the requirement imposed on teachers ‘to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Article 3(1) of Regulation No 1612/68’.⁶² While the Court recognized that a Member State policy designed to maintain and promote the national language should in principle be recognized as pursuing a legitimate objective, it made clear that a wider-cast domestic policy would fall foul of EU law. If, for example, a Member State imposed language requirements unrelated to the post offered, the ECJ would interpret this as an unjustifiable protective measure restricting access to its employment market.⁶³ Whether such a narrow exception to the rule on free movement of workers may interfere with the full implementation by the Member States of their obligations under the Framework Convention to promote and protect minority languages within their territories remains to be seen.⁶⁴

The litigation surrounding the Dutch law on the media (*Mediawet*) provides a second illustration. These cases presented the Court with the question whether

⁵⁹ See eg King, Toby ‘Human Rights in European Foreign Policy: Success or Failure for Post-modern Diplomacy?’ 10 EJIL (1999) 313.

⁶⁰ See further below.

⁶¹ OJ, English Special Edition, 1968(II), 475.

⁶² Case C-379/87 *Groener* [1989] ECR 3967, para 21.

⁶³ See the case of *Groener*, *ibid*, para 23. The imposition of such a condition would be assimilated to a situation such as that which arose in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR 4139, which concerned the situation of an Italian national who applied to take part in a competition for a post with a private banking undertaking in Bolzano, but whose application was rejected because, although perfectly bilingual in Italian and German, he could not obtain a certificate of bilingualism issued by the public authorities of the province of Bolzano.

⁶⁴ Framework Convention, Arts 5, 9–12, 14.

the *Mediawet* restricted the freedom to provide audio-visual services contained in Articles 43–48 of the EC Treaty. The contested provisions included a prohibition on Dutch broadcasting corporations from investing resources into media services outside the Netherlands (to ensure funds were reinvested internally);⁶⁵ and restrictions on advertising contained in programming broadcast into the Netherlands from another Member State (to prevent excessive advertising and prevent dependency on advertising revenue from influencing programming).⁶⁶ The Court accepted that ‘the Mediawet is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands’ and found that these were legitimate objectives.⁶⁷ It found further that the restriction on investing in media services outside the Netherlands was justifiable,⁶⁸ but that the restrictions on advertising were not.⁶⁹ The distinction that may be drawn is that the latter restrictions were unacceptable because they effectively shielded Dutch broadcasting companies from competition from other Member States, whereas the former restrictions only had a tangible impact on national broadcasting companies in the Netherlands. Again this highlights that the ECJ may pay deference to a national policy to promote and protect cultural rights, but only to a limited extent and not where this policy has protectionist results. A Member State wishing to establish a more far reaching policy in conformity with obligations under the Framework Convention evidently risks conflict with EU law.

On the basis of these cases, it is easy to see why the present situation is unworkable. EU law as it stands will only permit Member States to prioritize human rights obligations which result in restrictive measures on the fundamental economic freedoms stipulated in the EC Treaty in limited circumstances. If EU law itself does not replicate the guarantees contained in international human rights law, a Member State will inevitably come into conflict with its EU obligations when giving effect to human rights treaties. As we know, the Member States may invoke the protection of fundamental rights in order to justify such restrictions, to the extent that such restrictions are non-discriminatory and proportionate.⁷⁰ But the margin of appreciation they are left in this regard may not be sufficient, at least where a Member State will seek not only to comply with its

⁶⁵ Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR 513.

⁶⁶ Case C-353/89 *Commission v Netherlands* [1991] ECR 4089; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda et al. v Commissariaat voor de Media* [1991] ECR 4007.

⁶⁷ *Vereniging*, *ibid.*, paras 9–10; *Commission v Netherlands*, *ibid.*, paras 3, 29, 30, 41, 42; *Stichting Collectieve* *ibid.*, paras 22–24.

⁶⁸ *Vereniging*, *ibid.*, para 15.

⁶⁹ *Commission v Netherlands*, paras 43, 48; *Stichting Collectieve*, paras 25, 30.

⁷⁰ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 71; Case C-36/02 *Omega* [2004] ECR I-9609, para 33.

human rights obligations, but also to adopt measures aimed at fulfilling human rights beyond the minimum requirement not to violate them. We will return to this problem in a moment. In addition though, and perhaps more importantly, allowing the Member States (under the conditions of non-discrimination and proportionality) to observe their pre-existing human rights obligations on a decentralized and individual basis may threaten the uniform application of EU law, a danger which would be even more pronounced with respect to treaties to which not all Member States are party, such as the Framework Convention. In the alternative, if we acknowledge that Article 307 requires Member States to remove incompatibilities between EU law and their pre-existing human rights commitments, we face the danger of Member States being led to withdraw from human rights treaties, which would be politically unacceptable and in certain cases contrary to international law. Neither of these outcomes is acceptable. The only means of resolving both of these problems is if the EU takes human rights treaties into account *as if it were directly obliged by them*, even in the case where not all Member States are party.⁷¹ This would ensure that all the Member States will be treated equally and that the supremacy and uniform application of EU law will be preserved.⁷²

D. Inspiring 'Respect' for Human Rights

The notion that human rights obligations impose more than a duty merely to refrain from violating human rights when action is taken is well established in international human rights law, including the case law of the European Court

⁷¹ This is effectively the 'universalised maximum standard' advocated by Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in The European Union' (1998) 35 CML Rev 670–674. This is not to say that Member States necessarily have to adopt common maximum standard domestic standards. The 'universal maximum standard' would form part of the *acquis communautaire* and therefore only apply to Member States insofar as they are implementing their obligations under EU law. It is conceivable therefore that individuals in Member States with lower standards of protection will find themselves better protected whenever their activities fall under the scope of EU law.

⁷² Weiler (see Weiler 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in Neuwahl and Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff, 1995) 51–76) argues against the introduction of a universal maximum standard based on the highest levels of protection found across the Member States because this risks ignoring the particularities inherent in different nations such that one State's high standards may be unrealistic, unacceptable, or irrelevant to another State. Weiler, rather, appears to call for the adoption of a single standard based on what the Community itself believes reflects an amalgamated and pan-European standard. However, he makes clear that this should not be regarded as a minimum common standard. Perhaps this standard is now embodied in the Charter of Fundamental Rights. At the same time Weiler argues that the ECJ should defer to domestic human rights standards which are higher than those recognized within EU law when called to adjudicate on particular cases. However, as outlined above, in practice, this is only permitted by the ECJ where interference with the EU's economic aims is minimal. Furthermore, Weiler's proposal would, again, undermine the uniform application of EU law.

of Human Rights.⁷³ The clearest expression of this has come from the UN Committee on Economic Social and Cultural Rights, responsible for monitoring the implementation of the International Covenant on Economic Social and Cultural Rights:

all human rights, impose... three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.⁷⁴

It is well-established by the ECJ that 'respect for the fundamental rights which form an integral part of... general principles of law is a condition of the legality of Community acts'.⁷⁵ However, while it is not our intention to enter a discussion on the nature of positive obligations in international human rights law,⁷⁶ we note that the ECJ does not seem to have acknowledged that human rights obligations are not of themselves purely negative in nature. Consider the approach the Court adopted towards the Family Reunification Directive at issue in the *Parliament v Council* case. The Directive obliges a Member State to permit entry and residence, for the purposes of family reunification, to minors where the minor's sponsor is residing lawfully in the Member State and has been in possession of a residence permit for at least one year and has a reasonable prospect of achieving the status of permanent resident.⁷⁷ Article 4(1) permits a Member State to derogate from this rule by requiring children over the age of 12 to satisfy an 'integration' requirement—which is left to national authorities to define. Parliament argued that nothing in the Directive prevented the Member States from adopting 'integration' requirements that would conflict with the right to family reunification guaranteed by Article 8 of the European Convention on Human Rights, as well Article 24 of the ICCPR and the CRC more generally. The ECJ opined that Community law 'could... not respect fundamental rights if it required, or

⁷³ See: A Mowbray, *The Development of Positive Obligations Under the European Court of Human Rights* (Hart Publishing, 2004); S Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' [2006] Public Law 498.

⁷⁴ UN Committee on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health*, General Comment 14, UN Doc. E/C.12/2000/4, para 33 in *Compilation of General Comments*. See also UN Committee on Economic, Social and Cultural Rights, *The Right to Education (Article 13)*, General Comment No.13 UN Doc. E/C.12/1999/10 at para 46, UN Committee on Economic, Social and Cultural Rights, *The Right to Adequate Food* (Article 11), General Comment 12 UN Doc. E/C.12/1999/5, para 15. Tomasevski and Scott and Macklem also regard this typology as being developed for all human rights. See K Tomasevski, *Women and Human Rights* (Zed Books Limited, 1993) 107; C Scott and P Mecklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' 141(1) *University of Pennsylvania Law Review* (1992) 1, 73.

⁷⁵ Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621, para 45; Opinion 2/94 *Accession by the Community to the European Convention on Human Rights* [1996] ECR I-1759, paras 34–35.

⁷⁶ For a brief discussion of what this might entail for the EU, see Ahmed and Butler 'The European Union and Human Rights: An International Law Perspective' 17 *European Journal of International Law* (2006) 771.

⁷⁷ See Council Directive 2003/86/EC, 22/9/03 [2003] OJ L251/12.

expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights'.⁷⁸ The wording suggests that legislation will be invalid if it leaves scope for a Member State to exercise its discretion in such a way as to conflict with human rights guarantees. This is significant because it seems to recognize a positive duty on the Community to protect human rights by preventing their violation by a Member State when it implements EC law. In the same way that a national legislator would be failing in its duty to protect individuals' right to life if its legislation created a wide and vaguely worded exception to the crime of homicide, the EU would be at fault if its legislation did not prevent a Member State from interpreting the 'integration' requirements in such a way as to violate the right to family reunification. In the event however, the ECJ did not find that the Directive could be interpreted in such a way as to permit a Member State to set conditions of integration that conflicted with the right to family reunification, despite the fact that the Directive contained no indication of what those conditions might be. Furthermore, the principle expressed in the judgment, in the excerpt quoted above,⁷⁹ appears to be contradicted by the Court's assessment of Article 8 of the Directive. Here the Court concluded that 'while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.⁸⁰ Thus, secondary legislation would be compatible with the requirements of fundamental rights insofar as it does not compel the Member States to violate such rights, even where it does not establish clear safeguards against such risk. This corresponds also with the position adopted by AG Kokott in her opinion in this case.⁸¹ Her view was that the contested provisions of the Family Reunification Directive must be examined 'in order to determine *whether there is sufficient scope for them to be applied in conformity with human rights*'. Otherwise put 'Community provisions are compatible with fundamental rights if they are *capable of being interpreted in a way which produces the outcome which those rights require*. [...] [What] matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights'.⁸² This suggests a much weaker standard of review: Community legislation will be valid as long as it can be interpreted in conformity with the general principles. The implication is that there is no requirement that Community law deny scope to a Member State to exercise its discretion under EU legislation in such a way as to violate human rights standards. The weaker standard of review is consistent with the approach in the *Lindqvist* case where the ECJ stated that it was for the national

⁷⁸ Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 23.

⁷⁹ See the text corresponding to the preceding note.

⁸⁰ Para 104. ⁸¹ Para 79–82 deal expressly with this question.

⁸² Para 79–82 of the opinion (emphasis added).

authorities to ensure that they did not adopt an interpretation of Community law that conflicted with the general principles of law, but that the Directive in question was not invalid merely for allowing a Member State discretion which could be exercised in this manner.⁸³ The approach thus adopted by the Court to reviewing EC legislation relies upon individual Member States being scrutinized on an *ad hoc* basis as particular cases emerge, either through preliminary references or enforcement actions by the Commission, which can hardly constitute a satisfactory solution. Thus the ECJ does ensure that the EU legislator respects human rights, but it does little to protect human rights, in that it does not require legislation to restrict the exercise of Member State discretion as a condition of its validity.

Were the Court to have developed its case law more in line with international human rights standards, where positive obligations are accepted as an inherent component of human rights, it would have allowed for greater levels of protection. It may be anticipated, however, that accession of the EU to the European Convention on Human Rights or the recognition of the binding status of the EU Charter of Fundamental Rights—both of which will be achieved or made possible by the adoption of the Reform Treaty—will lead the case law to develop in this direction. The Working Group on the incorporation of the Charter and of the accession of the Union to the European Convention on Human Rights (established under the Convention on the Future of Europe, which itself prepared the ground for the intergovernmental conference that agreed on the text of the Constitutional Treaty), were in agreement that accession to the European Convention on Human Rights or incorporation of the Charter would ‘in no way modify the allocation of competences between the Union and the Member States’. Neither act would involve conferring new powers on the Union, including a general competence on human rights. However, this did not exclude the imposition of positive obligations on the EU. On the contrary, it was acknowledged that such positive obligations ‘to take action to comply with the ECHR would arise’, albeit ‘only to the extent to which competences of the Union permitting such action exist under the Treaty’.⁸⁴ According to this view, while accession to the European Convention on Human Rights would not result in a transferral of supplementary powers to the Union, it might affect the exercise of any powers it has been attributed, to the extent that positive obligations to protect and fulfil human rights are imposed under the European Convention on Human Rights.

Similar positive obligations could be derived from the EU Charter of Fundamental Rights, or indeed from the fundamental rights recognized as general principles of law in the case law of the Court. In support of this one can point to Article 51 of the Charter and the appended explanatory note. Although

⁸³ Case C-101/01 *Lindqvist* [2003] ECR I-12971, paras 84–88.

⁸⁴ European Convention, Final report of Working Group II, doc. CONV 354/02 (22 October 2002), p 13 (footnote omitted).

Article 51(2) repeats that the Charter does not create new competences for the Union, Article 51(1) states that the institutions and the Member States in the implementation of EU law shall 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers', thereby suggesting that positive obligations may be derived from the Charter. This is reinforced by the prescription that application of the Charter must have 'due regard for the principle of subsidiarity', which again would suggest that the Charter will give rise to positive obligations on the EU to take action to promote human rights. Furthermore the explanatory note on this clause states that 'an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers'.⁸⁵ While couched in restrictive terms this actually acknowledges that the Charter might well impose a duty on the Union to exercise whichever powers it has been attributed in such a way as to ensure the effective protection and promotion of the rights contained therein.

The decision of the ECJ in *Parliament v Council* contains contradictory statements, and cannot be seen as a clear acknowledgement that the Union is under a positive obligation to protect human rights by inserting safeguards into legislation to limit discretion conferred on the Member States. If the pedigree of the general principles, as rights grounded in international law, had been recognized the imposition on the European legislator of a positive obligation to protect them when adopting a measure might have appeared self-evident. Of course, international human rights law acknowledges an obligation not merely to protect, but also to fulfil or promote human rights, and even if the *Parliament v Council* case hints that the Union may have to protect human rights, there is certainly no indication in the case law that the Union may have to promote human rights. In this vein the EU Network of Independent Experts on Fundamental Rights urged the Union to 'move away from a conception of the international obligations of the Member States in the field of human rights which see these obligations simply as imposing limits' on the Union. Rather the Union institutions must ask themselves 'which initiatives they could take, to favour [the implementation of human rights]... by the Member States, where the Union has the required powers to act and where exercising these powers could truly add value to the protection of fundamental rights in the Union'. In addition to respect for human rights, they 'should be promoted, insofar as the institutions of the Union remain... in the limits of the powers which have been attributed to them'.⁸⁶ If the Charter and the general principles reflect the international commitments common to the Member States then the rights therein should be interpreted in conformity with the scope and meaning accorded to those rights by those instruments. We return

⁸⁵ [2007] OJ C303/17 (14.12.07).

⁸⁶ EU Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the Union in 2003, January 2004, pp 30–31. For the sake of transparency, it should be noted that one of the authors (O De Schutter) was the main author of this report.

to the question of promoting human rights in the final section of the article. We now examine the different means through which the Union could remedy its disconnectedness from international human rights law.

III. Anchoring the Union in the International Law of Human Rights

While there are grounds for holding that the EU is already bound under international law to guarantee universally recognized human rights,⁸⁷ we are less interested here in exploring the question whether it has such obligations, than in the question of which tools could be used in order to improve the accountability of the EU for any human rights violations it commits. A number of possibilities exist for thus linking fundamental rights protected under EU law and the international law of human rights. The most far-reaching solution would be accession by the Union to international human rights treaties. Alternatively, the monitoring bodies established under the UN human rights treaties or the Council of Europe, could subject the Union to some form of supervision. We review both possibilities in the following section. We then discuss the implications which would follow from the acceptance of external supervision of the EU by monitoring bodies established under human rights treaties, focusing in particular on the question of positive obligations imposed on the EU.

A. Acceding to International Human Rights Treaties

The EU is not yet party to any treaty codifying human rights standards.⁸⁸ There are a number of treaties, however, to which the EU may become a party in the future. Among the human rights treaties concluded in the framework of the UN, the most immediate prospect for EU accession comes in the UN Convention on the Rights of Persons with Disabilities.⁸⁹ The Union has signed this and the Commission has indicated that it will become a full party to the Treaty alongside

⁸⁷ This issue was discussed at length in a previous publication which put forward different possibilities in this regard. See Ahmed and Butler, 'The European Union and Human Rights: An International Law Perspective' 17 *European Journal of International Law* (2006) 771.

⁸⁸ The EU is party to around 140 multilateral treaties, a list of which can be found online at: <<http://ec.europa.eu/world/agreements/searchByType.do?id=2>>.

⁸⁹ UN General Assembly resolution 61/106, 13/12/06. The European Community signed the treaty on 30 March 2007 along with 96 other parties. See 'Multilateral Treaties Deposited with the Secretary-General' available online at: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp>>. See also EU Press Release IP/07446, 30/3/07. The Commission took an active role in negotiating the treaty on behalf of the Union and the Convention makes explicit provision for accession by 'regional integration organisations' under Article 44. The Treaty makes no distinction in the range of obligations that would apply to such organizations stating that '[r]eferences to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.'

the Member States.⁹⁰ Among the treaties adopted in the framework of the Council of Europe, the accession of the EU to the European Convention on Human Rights shall be a priority following the entry into force of the Reform Treaty which, like the abandoned Constitutional Treaty,⁹¹ mandates the EU to accede to the European Convention on Human Rights.⁹² Furthermore, the 1997 Convention on Human Rights and Biomedicine provides for accession by the European Community,⁹³ as does the 1999 Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁹⁴ Once the EU ratifies or accedes to these human rights treaties⁹⁵ it will of course be subject to the range of obligations therein in the exercise of the competences it has been attributed. Execution of the substantive obligations will be overseen to a greater or lesser extent by the supervisory mechanisms established by these instruments. In this section, we offer a brief description of these mechanisms, to which, following accession, the EU would be subjected.

(i) *The UN Disabilities Convention*

The implementation of the Disabilities Convention, as the other core UN human rights treaties, will be overseen by a Committee of independent experts, called

⁹⁰ Vladimír Spidla (EU Commissioner for DG Employment and Social Affairs), 'Launch of the Year of Equal Opportunities' 2/4/07, SPEECH/07/218.

⁹¹ ECJ Opinion 2/94 (Accession by the Community to the European Convention on Human Rights [1996] ECR I-1759), made clear that the EU would not have competence to accede to the European Convention on Human Rights without an amendment to the existing treaties to that effect. The aborted Treaty Establishing a Constitution for Europe, 16 December 2004, [2004] OJ C310/01, Art I-9(2) would have obliged the EU to accede to the European Convention on Human Rights.

⁹² The Reform Treaty amends Article 6 of the TEU with a new Article 6(2) reading: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.' See Treaty of Lisbon amending the TEU and ECT (CIG 14/07, 3/12/07). Protocol 14 to the European Convention on Human Rights (once it enters into force) will amend the Convention to expressly provide for accession by the EU; Article 17 of the Protocol will amend Article 59 of the Convention to this effect. See Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No: 194, 13/5/04.

⁹³ Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, CETS No: 164, opened for signature in Oviedo on 4 April 1997.

⁹⁴ ETS No 108, 28/1/81. The right to protection of one's private life is articulated in: ICCPR, Art 17; ACHR, Art 11; European Convention on Human Rights, Art 8. Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows, ETS No 181, 8/11/01. See Article 3(2).

⁹⁵ In addition, the EU may accede to a number of conventions adopted within the Council of Europe, but which are not human rights instruments *per se*, as understood in this article, although, by imposing on the State parties the adoption of certain measures, they may contribute to the protection of human rights. Examples are the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No: 201, opened for signature in Lanzarote on 25 October 2007 (see Article 45(1))); or the Convention on Action against Trafficking in Human Beings (CETS No: 197, opened for signature in Warsaw on 16 May 2005 (see Article 42(1))).

the Committee on the Rights of Persons with Disabilities.⁹⁶ The Committee will have among its tasks the consideration of reports from parties to the Treaty, including the issuing of recommendations.⁹⁷ Reports on the progress made in implementing the Convention are expected from parties at regular intervals (at least every four years according to Article 35). As is the practice of the existing UN human rights treaty monitoring bodies,⁹⁸ the Disabilities Committee will—after reviewing its report and engaging in an oral dialogue with representatives of the EU—issue ‘Concluding Observations’ which will contain concrete indications for the Union on its general state of compliance with the Convention and recommend future changes on issues of concern to the Committee.⁹⁹ The assessments of the committees are based not only on the report provided by the party under examination but also on ‘shadow’ reports received from interested non-governmental organizations (NGOs) and information submitted by UN agencies.¹⁰⁰ This ensures that a more balanced account is presented to the Committee. While Concluding Observations are targeted at situations falling under the jurisdiction of each Party, the UN human rights treaty bodies also issue General Comments or Recommendations. These allow them to elaborate on the meaning and content of a particular right or set of obligations in the Treaty as guidance for parties.¹⁰¹

If the EU also becomes party to the Optional Protocol to the Disabilities Convention, individuals will be able to bring claims against the EU before the Disabilities Committee. After exhausting domestic remedies individuals may contact the Disability Committee with the substance of their complaint.¹⁰²

⁹⁶ According to Article 34 of the Convention the members of the Committee are to be individuals of high moral standing and recognized competence in the area, elected by State parties with due regard for equitable geographical distribution.

⁹⁷ See Articles 35 and 36 of the Convention. These are commonly known as ‘concluding observations’ or ‘concluding comments’ among the UN human rights treaty monitoring bodies.

⁹⁸ These are: the HRC (monitoring the ICCPR, 1966, 999 UNTS 171); the Committee on Economic, Social and Cultural Rights (monitoring the International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3); the Committee on the Elimination of Racial Discrimination (monitoring the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195); the Committee on the Elimination of Discrimination Against Women (monitoring the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13); the Committee Against Torture (monitoring the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85); the Committee on the Rights of the Child (monitoring the Convention on the Rights of the Child, 1989, 1577 UNTS 3); the Committee on Migrant Workers (monitoring the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, GA Res 45/158, 18/12/90). The documents issued by these bodies are available online at: <<http://tb.ohchr.org/default.asp>>.

⁹⁹ See eg Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights, 26/22/01, CCPR/C/66/GUI/Rev2.

¹⁰⁰ A Clapham, ‘UN Human Rights Reporting Procedures: an NGO Perspective’, in P Alston and J Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 175; Report of the UN Human Rights Committee 2006, Vol 1, A/61/40 (Vol. 1), para 14.

¹⁰¹ See Article 29 of the Disabilities Convention. These general comments aim to provide general guidance for all the parties on the meaning of a provision in the Treaty.

¹⁰² Optional Protocol, Art 2.

Proceedings are entirely written. However, they present an adversarial character in that both parties are provided the opportunity to provide responses to each others' arguments.¹⁰³ Once it has made a 'determination on the merits' the Committee may 'forward its suggestions and recommendations' to the parties to the dispute.¹⁰⁴ These may include a finding that there has been a violation of the Treaty, a direction to pay legal costs or damages, and a direction to take specific remedial action.¹⁰⁵ These are not of themselves legally binding upon the parties to the dispute but they do have some legal weight. The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, has maintained that its findings on individual cases are effectively binding on States because States have, firstly, committed themselves to offer a remedy to victims of violations and, secondly, have expressly delegated the task of finding violations to the Committee.¹⁰⁶

(ii) *The European Convention on Human Rights*

Should the EU accede to the European Convention on Human Rights, it will become subject to the jurisdiction of the European Court of Human Rights.¹⁰⁷ The lack of a reporting system in the European Convention on Human Rights means that the European Court of Human Rights would not be able to offer programmatic guidance on policy-formulation and promotional activities to the EU in the same way as the Disabilities Committee. However, this is a gap that might be filled by the Council of Europe's Commissioner for Human Rights, to which we return below.¹⁰⁸ In addition, while the European Court of Human Rights does not adopt statements expounding its understanding of the requirements of the Convention in general terms—as do the UN human rights treaty bodies—this function is to a certain extent fulfilled by the Committee of Ministers of the Council of Europe, through the adoption of recommendations.¹⁰⁹ The European Court of Human Rights is principally tasked with dealing with claims of individuals alleging violations

¹⁰³ See I Butler, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law*, (Intersentia, 2007) 123–131.

¹⁰⁴ Optional Protocol, Art 5.

¹⁰⁵ See Optional Protocol, Arts 4 and 5.

¹⁰⁶ See n 34, above.

¹⁰⁷ European Convention on Human Rights, Art 32.

¹⁰⁸ The institution of the Commissioner for Human Rights was established by Resolution (99)50 adopted by the Committee of Ministers on 7 May 1999 at its 104th Session, as a 'non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe' (Article 1 of the resolution). While the Commissioner for Human Rights may directly contact the governments of the Member States of the Council of Europe (Article 7 of the resolution), his mandate does not include addressing the EU, which is not a member of the Council of Europe. However, as we shall see, the Commissioner inevitably makes statements in relation to the EU since his mandate extends to any issues arising on the territory of any State member of the Council of Europe.

¹⁰⁹ See eg below, n 116. The European Court of Human Rights may deliver advisory opinions under Articles 47–49 of the European Convention on Human Rights, but it does not often exercise this function. The European Court of Human Rights delivered its first Advisory Opinion on 12 February 2008, on certain legal questions concerning gender balance in the composition of the lists of candidates submitted for the election of judges to the Court.

by the State (or in this case, the EU) though it may also receive inter-State complaints.¹¹⁰ The judgments of the European Court of Human Rights are legally binding and the Committee of Ministers of the Council of Europe oversees their implementation.¹¹¹ The European Court of Human Rights may order the payment of financial compensation by the Party found to have violated the Convention, though more frequently it will merely find that a declaration of the existence of a violation is remedy enough. It will rarely give specific directions on how to remedy a violation,¹¹² leaving it to the Committee of Ministers to determine whether this has taken place and whether action has been taken to avoid systematic repetition of the violation in the future.¹¹³

(iii) The Council of Europe Convention on Human Rights and Biomedicine, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

These two Conventions provide for the creation of consultative committees with fairly limited roles and similar composition: these are the 'Consultative Committee' created under the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, and the 'Steering Committee on Bioethics' created under the Convention on Human Rights and Biomedicine. These committees may both make or respond to proposals relating to the amendment of the Treaty, respond to requests for clarification of the Treaty's terms and make proposals on how to better implement the Treaty.¹¹⁴ The Consultative Committee is composed of both representatives of State parties, observers (who may be representatives of third States not parties to the Convention as well as intergovernmental organizations) and independent experts for the purposes of consultation.¹¹⁵ The Consultative Committee has produced a series of

¹¹⁰ European Convention on Human Rights, Arts 34 and 33 respectively.

¹¹¹ European Convention on Human Rights, Art 46.

¹¹² For an example of where this did occur, see European Court of Human Rights (Grand Chamber) *Assanidze v Georgia* (Application no 71503/01, 8/4/04).

¹¹³ See eg Decisions Adopted by the Deputies of the Committee of Ministers, 997th (DH) meeting, 5–6 June 2007, CM/Del/Dec(2007)997.

¹¹⁴ For the Convention on Data Protection, see Article 19. The Explanatory Report (para 87, available online at: <<http://conventions.coe.int/Treaty/en/Reports/Html/108.htm>>) to the Convention States: 'It was not held desirable that the committee should take the form of an international data protection authority. Nor was it considered appropriate to entrust to the committee the formal settlement of disputes arising over the application of the convention. Of course, the committee may help to solve difficulties arising between Parties.' For the Biomedicine Convention, see Article 32. According to Article 29 the Steering Committee or the parties may also request the European Court of Human Rights for an advisory opinion on the interpretation of the Treaty.

¹¹⁵ See Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108): Rules of Procedure, Articles 2–4. This document is available through the website of the Council of Europe at: <http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/background/T-PD_RULES.pdf>. For background on the committee, see: <http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/background/1Background.asp#TopOfPage>. The current committee is a merger of the original

(non-binding) recommendations to State parties elaborating detailed rules on the application of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data to specific circumstances.¹¹⁶

Thus, the EU stands on the cusp of a new stage of human rights protection, in particular with regard to possible accession to the European Convention on Human Rights and the UN Disabilities Convention which are extensive in terms of the substantive rights that they guarantee. Holding the EU directly accountable to the monitoring bodies that operate under these treaties will constitute a long-overdue express recognition that the EU's extensive powers should be subject to review for compliance with human rights obligations by an entity that operates outside the EU's own self-referential 'system' of human rights protection. However, neither these two instruments, nor those instruments in combination with the Council of Europe Convention on Human Rights and Biomedicine and Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data to which the EU may accede in the future, cover the entire range of international human rights protected through several other treaties elaborated under the aegis of the United Nations. The importance of these UN human rights treaties is evidenced by the fact that most or all of the EU Member States are parties to these instruments, thereby recognizing the significance of the rights they guarantee. For the reasons explained above, in addition, we believe that the EU should take into account all human rights treaties to which at least one EU Member State is a party, in order to avoid compromising either the commitments of that State under the said treaty, or the uniform application of EU law. Even if the EU is not bound, in the international legal order, by the treaties to which its Member States have acceded, at the very least it may be prohibitively costly, in both political and practical terms, to ignore them.

As we have seen, certain human rights instruments recently concluded within the UN and Council of Europe provide for the possibility of accession by the EU. This has been the case, in general, where certain competences have been conferred

consultative committee and a Project Group on Data Protection, which was a subsidiary body of the committee composed of experts. See also Explanatory Memorandum to Recommendation No R (2002) 9 of the Committee of Ministers to Member States on the protection of personal data collected and processed for insurance purposes, adopted by the Committee of Ministers 18 September 2002 at the 808th meeting of the Ministers' Deputies, available online at: <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international_legal_instruments/EM_R\(2002\)9_EN.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international_legal_instruments/EM_R(2002)9_EN.pdf)>. On the Steering Committee, see 'Terms of Reference' in Steering Committee on Bioethics (CDBI), 'Information Document Concerning the CDBI', CDBI/INF (2007) 1 rev (available at: <http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Bioethics/CDBI/>).

¹¹⁶ It would appear that the majority of these are subsequently adopted by the Committee of Ministers which requests states parties to give effect to the recommendations in national law. For the Consultative Committee see: Recommendation No R (2002) 9 on the protection of personal data collected and processed for insurance purposes (18 September 2002). For a collection of these, see: <http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international_legal_instruments/2Recommendations%20and%20resolutions%20of%20the%20Committee%20of%20Ministers.asp#TopOfPage>. For the Steering Committee, see examples in 'Information Document Concerning the CDBI' (n 115 above).

upon the Union by its Member States in relation to the domain covered by the instrument concerned. We should move beyond the current practice, however. Accession of the EU should not be limited to treaties which have a direct overlap with areas of EU competence. Human rights obligations affect the exercise of all public power since it is through the exercise of their authority that States or other entities violate or uphold human rights. In this sense human rights cut across all areas of EU competence. Accordingly, accession by the EU to those treaties to which its Member States are party (partially or entirely) provides the best means of ensuring that the EU's competences are exercised in such a way as to give full effect to the obligations incurred by its Member States.

Indeed, were it not for the stipulations of human rights treaties, which traditionally are open to accession only by States, these precedents could be imitated in other areas in which the European Union has taken legislative action, thereby exercising competences it has been attributed by its Member States. Of course, in the absence of a general power of the Community or the Union in the field of fundamental rights,¹¹⁷ the limits imposed on the exercise of the international powers of the Community or the Union are a serious obstacle to their accession to international instruments for the protection of human rights. However, even under the present definition of the external powers of the Union, accession to a number of international instruments in the field of human rights protection may be envisaged.¹¹⁸ Just as the achievements of the European Community in the field of data protection have been deemed sufficient to envisage the accession of the Community to the Convention concluded on this question in the framework of the Council of Europe, similarly the *acquis* of EC law in the field of equal treatment between women and men and in the field of non-discrimination on grounds of race or ethnic origin would appear sufficient to identify a power of the Community to accede to the UN Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹⁹ and on the Elimination of All Forms of Racial Discrimination (CERD).¹²⁰ It has also been argued that

¹¹⁷ See on this the opinion delivered on 28 March 1996 by the European Court of Justice: Opinion 2/94, *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para 20. The Court stated in that opinion that the Community institutions do not have at their disposal a 'general power to enact rules on human rights or to conclude international conventions in this field', although it did not question that respect for human rights constituted a 'condition of lawfulness of Community acts': see paras 27 and 34 of the opinion. On this opinion, see, inter alia, O De Schutter and Y Lejeune, 'L'adhésion de la Communauté européenne à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes', *Cahiers de droit européen*, 1996, 555; G Gaja, 'Opinion 2/94' (1996) 33 CML Rev 973.

¹¹⁸ *Report on the Situation of Fundamental Rights in the European Union in 2003*, prepared for the EU Network of Independent Experts on Fundamental Rights, January 2004, at pp 19–20. Report available online at: <http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm#>.

¹¹⁹ 1249 UNTS 20378, adopted by UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 27 Member States of the EU have ratified this instrument.

¹²⁰ 660 UNTS 9464, adopted by UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965, and opened for signature at New York on 7 March 1966. All the 27 Member States of the EU have ratified this instrument.

the EU should accede to the 1996 Revised European Social Charter, adopted within the Council of Europe as a complement, in the field of economic and social rights, to the 1950 European Convention on Human Rights;¹²¹ or to the Geneva Convention on the status of refugees of 28 July 1951.¹²²

We may go one step further. The time may have come to question the classical approach to the question of the competence of international organizations to accede to international agreements, when the concerned agreements relate to the promotion and protection of human rights. It is well established that the competence of international organizations is a limited one: they may only act under the condition that, and insofar as, they have been attributed the power to do so by the Member States to which they owe their existence.¹²³ We may ask however, which implications follow for the accession of an international organization such as the EU to human rights treaties? By acceding to such instruments, the Parties undertake to respect certain minimal standards for the benefit of the persons under their jurisdiction, which implies in the first place that they will not adopt any measures which derogate from these standards. Insofar as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures—to fulfil positive obligations (to act)—that the question of competences may play a role. Once this interpretation is agreed upon, the prospect of the EU acceding to a wide range of human rights treaties becomes significantly easier to envisage.

B. Alternatives to Accession: Monitoring the EU through its Member States

Pending accession by the EU to human rights treaties, or as an alternative to accession, the monitoring bodies established under existing human rights treaties should develop tools to supervise the EU itself, and not only its Member States. This section discusses the possibility that the EU could be subject to direct

¹²¹ The Revised European Social Charter of 3 May 1996 (ETS No 163) improves upon the original European Social Charter of 18 October 1961, by extending the list of rights protected. On the question of the accession of the EU to the Council of Europe Social Charter, see O De Schutter, 'Anchoring the European Union to the European Social Charter: The Case for Accession', in G de Búrca and B de Witte (eds), *Social Rights in Europe* (OUP, 2005) 111–152; and, for a more technical discussion, O De Schutter, *L'adhésion de l'Union européenne à la Charte sociale européenne* (EUI Working Paper LAW No 2004/11, 42 pages).

¹²² 149 UNTS 2545.

¹²³ In its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflict*, the International Court of Justice stated that: '[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them' (*ICJ Reports 1996*, 66, at 78 (para 25)).

scrutiny by the monitoring bodies responsible for supervising the implementation of human rights treaties to which EU Member States are parties. Our premise is that, if jurisdiction over certain situations is shared between the EU and its Member States, then monitoring of the Member States must be complemented with monitoring of the EU in those areas within its competence. The practice of certain monitoring bodies suggests a willingness on their part to extend their supervisory functions to States and intergovernmental organisations (IGOs) that are not themselves parties to their particular treaty but do exercise a degree of control over territory belonging to a State party. This existing practice forms the basis for suggesting more comprehensive engagement of the EU by the UN human rights treaty monitoring bodies, as well as by the Council of Europe monitoring bodies. We first describe such practice (a) and then examine whether it could be generalized (b).

(i) The Existing Practice of Human Rights Monitoring Bodies

One of the functions of the UN human rights treaty bodies is to receive and comment upon reports submitted periodically by the parties. In exercising this function, the HRC, responsible for the implementation of the ICCPR, has established two precedents that support the proposition that monitoring bodies could request the EU to submit to its supervision directly. In 1997, the exercise of sovereignty over the territory of Hong Kong reverted back to China from the United Kingdom. Under the terms of a Joint Declaration the United Kingdom and China agreed on the continued application of the ICCPR to Hong Kong, and in 1997 China notified the UN Secretary-General of its intention to report to the HRC in relation to Hong Kong.¹²⁴ The HRC had underlined in its 1996 Concluding Observations on the UK that '[o]nce the people living in a territory enjoy the protection of the rights under the International Covenant on Civil and Political Rights, such protection cannot be denied to them merely by virtue of dismemberment of that territory or its coming under the sovereignty of another State or of more than one State.'¹²⁵ Thus in the HRC's view, irrespective of any will on the part of China to submit to its supervision, the HRC was entitled to exercise its monitoring functions in respect of that territory, a point which it reiterated in its General Comment 26 on the 'Continuity of Obligations'.¹²⁶ Thus, the fact that

¹²⁴ See Report submitted by China in respect of Hong Kong, CCPR/C/HKSAR/99/1, 16/6/99, paras 1–5.

¹²⁵ Concluding Observations on the UK CCPR/C/79/Add.69, 18/11/96, para 4.

¹²⁶ China submitted its first report in relation to Hong Kong in 1999. For the report, see n 125, above and also see Concluding Observations on China (Hong Kong) CCPR/C/79/Add.117, 12/11/99. General Comment 26, 'Continuity of Obligations' (1997), in 'Compilation of General Comments Adopted by Human Rights Treaty Bodies', UN Doc. HRI/GEN/1/Rev7, 12/5/04, 172–173. The wording used by the HRC in the General Comment is: 'the rights guaranteed under the Covenant belong to the people living in the territory of a State party, and that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory'.

China is not a party to the ICCPR is not an obstacle to the extension, to a territory administered by China, of the supervisory role of the HRC. Our second example is more recent and perhaps even more significant. In 2004, the HRC requested the UN Interim Administration Mission in Kosovo (UNMIK) to submit a report on the human rights situation in Kosovo in response to a submission of Serbia during consideration of its periodic report.¹²⁷ Kosovo is formally within the territory of Serbia, a party to the ICCPR, but has been administered by UNMIK since 1999. The HRC made this request of UNMIK after Serbia explained its inability to report on the implementation of the ICCPR in Kosovo given that authority over the territory lay in the hands of the UN. A similar approach has been taken in the European context where the Council of Europe has concluded agreements with NATO¹²⁸ and UNMIK¹²⁹ authorizing the Committee on the Prevention of Torture to access detention facilities run by these organizations for the purposes of supervising implementation of the European Convention for the Prevention of Torture.¹³⁰

These examples are limited to situations where the territory of an existing State party to a treaty is actually being administered by another State or by an international organization. It might be objected that this situation is not comparable to that of the EU in relation to its Member States since the EU itself does not administer territory. Rather the EU relies on the authorities of the Member States to implement and enforce EU Law.¹³¹ Nevertheless, since the EU Member States are bound to comply with the obligations imposed on them under EU law—from which it follows, as a matter of course, that EU law should be accorded supremacy over any national rules¹³²—and since broad areas of competence have

¹²⁷ See Concluding Observations on Serbia, CCPR/CO/81/SEMO, 12/8/04; Concluding Observations on the report on Kosovo (Serbia) submitted by the United Nations Interim Administration Mission in Kosovo, para 4. See UN HRC Report 2005/2006, Vol I, A/61/40, 68.

¹²⁸ Press Release, 'Council of Europe Anti-Torture Committee gains access to NATO run detention facilities in Kosovo', 19/7/06. Available online at: <<http://www.cpt.coe.int/documents/srp/2006-07-19-eng.htm>>.

¹²⁹ Agreement between the UN Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 23/8/04. Available online at: <<http://www.cpt.coe.int/documents/srp/2004-08-23-eng.htm>>.

¹³⁰ European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, CETS No 126, opened for signature in Strasbourg on 26 November 1987.

¹³¹ In this respect, the Member States are under a so-called 'duty of genuine' or 'loyal cooperation' derived from Article 10 of the ECT: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.' On the meaning of Article 10, see: Case C-433/03 *Commission v Germany* [2005] ECR I-6985; Case C-105/03 *Pupino* [2005] ECR I-5285.

¹³² This principle was articulated in Case 6/64 *Costa v ENEL* [1964] ECR 585: '... the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions... without being deprived of its character as Community law and without the legal basis of the Community being called into question.'

been transferred to the EU, it is hard to deny that authority over the territory of Member States is at the very least shared with the EU.¹³³ Indeed the ECJ itself maintained very early on that there has indeed been a real transfer of sovereignty from the Member States to the EU.¹³⁴ The function of executing law and policy at the national level lies almost exclusively with the Member States' own administrative structure, but the function of determining the content of that law and policy is exercised jointly with the EU. Taking these considerations into account, it does not seem too far fetched to suggest that the monitoring bodies supervising those treaties to which the EU Member States are party, should also engage with the EU, not instead of, but as a complement to, their supervision of the Member States. The UN human rights treaties concerned include: the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. It is arguably open to any of the committees supervising these treaties to engage with the EU in the same way as the HRC has with UNMIK and China on the basis of its joint rule over the territory of the Member States.

The proposition that the UN human rights treaty monitoring bodies could engage the EU directly over the fulfilment of obligations undertaken by its Member States is not without some precedent within the EU. The principal example is that of the UN's High Commissioner for Refugees.¹³⁵ Article 63 of the EC Treaty gives the EU competence to regulate matters relating to the 1951 Convention Relating to the Status of Refugees¹³⁶ and its 1967 Protocol.¹³⁷ All the

¹³³ Article 3 of the ECT lists 21 separate policy areas, while the TEU contains a further two in titles V and VI.

¹³⁴ 'By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves': Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹³⁵ A further example is that of the Consultative Committee of the Convention on Personal Data discussed above (see above, nn 114–117 and accompanying text). The CPD Consultative Committee recently addressed the EU over a recent proposal for legislation in the area of privacy expressing its concerns at the planned Council Framework Decision. See Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-PD), T-PD-BUR (2006) 15 E FIN, 20/3/07, Paper Outlining the T-PD's Initial Remarks Concerning a Proposal for a Council Framework Decision on the Protection of personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters. This is also available as document of the Council of Ministers (Interinstitutional File: 2005/0202 (CNS), 8274/07, 5/4/072).

¹³⁶ 189 UNTS 150. Sometimes referred to as the 'Geneva Convention'.

¹³⁷ Protocol Relating to the Status of Refugees, 606 UNTS 267. Sometimes referred to as the 'New York Protocol'.

EU Member States are parties to both these instruments.¹³⁸ Among other things, these treaties establish guarantees of treatment for those who are accorded refugee status¹³⁹ as well as enshrining the principle of 'non-refoulement' which prevents an individual from being returned to their country of origin where they face a 'well-founded fear of being persecuted' on specified grounds.¹⁴⁰ In the context of its policy on visas and asylum, Article 63 obliges the Union to enact procedural and substantive provisions relating to individuals seeking asylum 'in accordance with' the 1951 Convention and its 1967 Protocol.¹⁴¹ Although the EU has been criticized for the content of its secondary legislation in this area, it does nonetheless purport to set minimum standards for the Member States to follow modelled on those contained in the 1951 Convention and its 1967 Protocol.¹⁴² Indeed, the legislation purports to go beyond these treaties to incorporate developments in the case law of the European Court of Human Rights, going beyond the protection of asylum-seekers to include other individuals in need of international protection.¹⁴³ However imperfectly the EU may be giving effect to the obligations of the 1951 Convention and 1967 Protocol incurred by the Member States, the legislation in this area establishes an important point of principle. Despite conferring on the Union the authority to establish a system of visas and entry requirements for third country nationals the Union has not purported to act as if it were free of the obligations that its Member States had previously undertaken

¹³⁸ 'Multilateral Treaties Deposited with the Secretary-General' available online at: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp>>.

¹³⁹ Chapter II of the 1951 Convention.

¹⁴⁰ 1951 Convention, Art 1(A)(2).

¹⁴¹ See the secondary legislation: Directive 2003/9 laying down minimum standards for the reception of asylum seekers ([2003] OJ L31/18 (06.02.03)); Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ([2003] OJ L50/1 (25.02.03)); Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ([2004] OJ L304/12 (30.09.04)); Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status ([2005] OJ L326/13 (13.12.05)).

¹⁴² K Hailbronner, 'Detention of Asylum Seekers' 9 *European Journal of Migration and Law* (2007) 159; A Maurer and R Parkes, 'The Prospects for Policy-Change in EU Asylum Policy: Venue and Image at the European Level' 9 *European Journal of Migration and Law* (2007) 173; C Phuong, 'Minimum Standards for Return Procedures and International Human Rights Law' 9 *European Journal of Migration and Law* (2007) 105; R Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' 9 *European Journal of Migration and Law* (2006) 79.

¹⁴³ Directive 2004/83 sets out when 'persecution' will be deemed to have occurred using and expanding on the terminology of the 1951 Convention (compare Chapters III and IV of the Directive to Article 1 of the 1951 Convention). The Directive also establishes 'subsidiary' protection which purports to limit the circumstances when states may return a refugee beyond those established in the 1951 Convention (compare Directive Chapter VI to Article 1(F) of the 1951 Convention). This 'subsidiary' status is supposed to reflect the case law of the European Court of Human Rights which prohibits States from returning an individual to any state where they may suffer cruel, inhuman, or degrading treatment or punishment or torture, for whatever reason this may be. (See the Commission's proposal (COM(2001) 510 final, 5–6) and the EP's report (A5–0333/2002 FINAL, 8/10/02, 52)). It is questionable whether it actually achieves this given the list of circumstances where 'subsidiary status' may be denied (compare Article 17 of the Directive to *Chahal v UK* ECHR 15/11/96, ECHR Reports 1996-V, para 82).

with respect to refugees. The Union implicitly acknowledges that it is bound by the international law in this area by its adoption of legislation that is overtly geared towards ensuring that treaty obligations are complied with in the context of its policy on visas and immigration.¹⁴⁴ This is confirmed by the relationship of the EU to the UN High Commissioner for Refugees, which is charged with 'providing international protection... to refugees'.¹⁴⁵ The 1967 Protocol places parties under an obligation to facilitate the Office of the High Commissioner for Refugees in supervising implementation of the two treaties, including providing information on the condition of refugees, the state of implementation and the law relating to refugees.¹⁴⁶ Although not making explicit reference to these obligations, Declaration No 17 accompanying the Amsterdam Treaty states that '[c]onsultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy'.¹⁴⁷ The Declaration has been put into effect through two exchanges of letters between the Commission and the UNHCR which provide for cooperation in developing EU policy in this area.¹⁴⁸ The UNHCR does not systematically monitor and report on compliance with the treaties in the same way as the HRC monitors the ICCPR. Rather than receiving reports from the EU or the Member States and issuing observations on compliance or receiving individual complaints, the role of the UNHCR is one of input into day-to-day policy formulation, in a relationship that has been described as one of partnership rather than lobbying,¹⁴⁹ and of expressing any concerns to the EU via, for example, letters to incoming presidencies.¹⁵⁰ One of the reasons for not producing

¹⁴⁴ The Council has stated that the 'aims of the Common European Asylum System... will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties.' See The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/01 (03.03.05).

¹⁴⁵ GA Res 428 (V), 14/12/50, Statute of the Office of the United Nations High Commissioner for Refugees, Annex, Article 1.

¹⁴⁶ 1967 Protocol, Arts II, III.

¹⁴⁷ Adopted by the Conference on the Amsterdam Treaty on then Article 73k (now Article 63) of the Treaty establishing the European Community [1997] OJ C340/134 (10.11.97). The Treaty of Lisbon amends Article 63 to state expressly that asylum policy 'must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

¹⁴⁸ The agreement between the Commission and UNHCR giving effect to Declaration No 17 took the form of an exchange of letters of 15 February 2005, available online at: <<http://www.unhcr.org/home/RSDLEGAL/42135cba4.pdf>>. The text of the first exchange of letters of 6 July 2000 between Commissioner Vitorino and Mrs Ogata may be requested from the Brussels office of the UNHCR. Reference is made to it in many UNCHR documents including 'UNHCR Toolboxes on EU Asylum Matters', available online at: <<http://www.unhcr.org/publ/PUBL/41b6d8694.html>>.

¹⁴⁹ Interview with UNHCR Brussels Office official, 26/6/07.

¹⁵⁰ See 2005 and 2000 letters of exchange, UNHCR Toolboxes and eg, 'UNHCR's Recommendations for Portugal's European Union Presidency, July–December 2007', 15/6/07, available online at: <<http://www.unhcr.org/protect/PROTECTION/4672a5a52.pdf>>; 'The Hague Programme two years on: UNHCR's Recommendations to the German Presidency of the European Union January–June 2007', available online at: <<http://www.unhcr.org/protect/PROTECTION/457ebab92.pdf>>.

systematic assessments of the EU's state of compliance with the treaties is that much of the EU legislation relies on implementation and interpretation by the Member States.¹⁵¹ Because of this the role of the national UNHCR offices in monitoring State compliance remains important and necessary.

The example of the partnership established between the EU and the UNHCR in the implementation in EU secondary legislation of the 1951 Geneva Convention and the 1967 New York Protocol illustrates the creative capacity of bodies responsible for monitoring or facilitating the implementation of human rights treaties, as well as a willingness on the part of the EU to cooperate. It is possible for such bodies to shift the emphasis of their work from the national to the EU level as greater authority is transferred from the Member States without the EU itself needing to become party to the treaties. In the area of visas, asylum, and immigration the EU expressly acknowledged that authority in this area could not be passed from the Member States without the existing obligations relating to refugees, and the UNHCR and EU have adapted to this by establishing a close relationship. But such formal recognition is not a prerequisite for the establishment, between the EU and other bodies, of similar forms of partnership.

(ii) Systematizing Existing Practice

Such arrangements as described above are informal. They are not conditional upon the EU acceding to the human rights treaties concerned. They are based on forms of voluntary cooperation between the EU and any supervisory bodies established under such treaties. We suggest that, in preparation for the formal accession of the EU to human rights treaties, such arrangements could be generalized across all human rights treaties to which the Member States have acceded. This is not a fantastical proposition. In fact, the EU has repeatedly demonstrated its willingness to facilitate the implementation of obligations imposed on its Member States under human rights treaties, by constructively engaging with the bodies in charge of supervising such treaties or by contributing to fora set up in order to clarify and develop the undertakings accepted under such treaties. For instance, while not party to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data or its Protocol, the EU has participated in the formulation of recommendations as an observer to the Consultative Committee established under that Convention. The Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters, which the European Commission presented in October 2005,¹⁵² has taken the Data Protection Convention and relevant recommendations of the

¹⁵¹ Interview with UNHCR Brussels Office official, 26/6/07.

¹⁵² For the original text of the Commission's proposal, see Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, COM(2005) 475 final, 4/10/05.

Consultative Committee as a point of reference.¹⁵³ Indeed, this practice of basing legislation proposed in the framework of the EU on the existing standards of the Council of Europe shall become a systematic practice in the future, as provided by the May 2007 Memorandum of Understanding between the Council of Europe and the European Union.¹⁵⁴ In the memorandum the EU acknowledges the 'Council of Europe as the Europe-wide reference source for human rights' and provides that the EU's institutions should take into account 'decisions and conclusions of its monitoring structures... where relevant'. It also provides for consultation and cooperation between the EU and the Council of Europe, including the Commissioner for Human Rights in order to ensure that EU law is coherent with human rights guarantees stemming from Council of Europe treaties.¹⁵⁵

The EU has found other innovative solutions to ensure that its Member States can continue to cooperate with third States in the promotion and protection of human rights. In particular, the Council of Ministers has authorized the Member States to ratify treaties 'in the interest of the Community' which contribute to the protection of the rights of the child or the rights of migrant workers.¹⁵⁶ Such authorization is given where the subject areas covered by the agreements are considered to fall within areas of exclusive competence of the Union (thus ordinarily preventing the Member States acceding to these treaties),¹⁵⁷ although the treaties themselves only allowed for States to become parties.¹⁵⁸ Accession by the Member States has then been followed up by EU legislation largely giving effect to the terms of these treaties or expressly permitting the Member States to execute them in exception to the general rule established by EU law that Member States may not act in areas of exclusive EU competence.¹⁵⁹ These are examples of the

¹⁵³ Commission Proposal (n 152 above), 4, 6. See also the Commission's Impact Assessment accompanying the proposal (SEC(2005) 1241, 4/10/05), 12, 16.

¹⁵⁴ *Ibid.*, 45.

¹⁵⁵ Memorandum of Understanding, paras 17–19.

¹⁵⁶ See Council Decision 2003/93/CE authorising Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children Council, 19/2/02 [2003] OJ L48/1 (21.02.03) (for the conclusion of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, reprinted in Hague Conference on Private International Law, Collection of Conventions (1951–2003), (2003), No 34); and Council Decision 2005/367/EC authorising Member States to ratify, in the interests of the European Community, the Seafarers' Identity Documents Convention of the International Labour Organisation (Convention 185), 14/4/05 [2005] OJ L136/1 (30.05.05) (for the conclusion of the Seafarers' Identity Documents Convention (Revised), 2003, ILO Convention 185, 19/6/03).

¹⁵⁷ Exclusive in the sense that while it was shared with between the Union and the Member States, the Union has adopted measures in these areas, thereby pre-empting action by the Member States. The background documents cited above refer to Case 22/70 *AETR* [1971] ECR 263.

¹⁵⁸ See: Report of the European Parliament on the proposal for a Council decision on authorising Member States to ratify in the interests of the Community the Seafarers' Identity Documents Convention of the International Labour Organization (Convention 185) A6–0037/2005, 10/2/05, 6–7; Council Decision 2003/93/CE, preamble, para 4.

¹⁵⁹ Council Regulation 2201/2003 ([2003] OJ L338/1 (23.12.03)) adopts a set of rules that reflect the rules set out in the 1996 Hague Convention, as well as the Convention of 25 October 1980 on

EU effectively attempting to incur obligations via its Member States where it cannot incur them directly, and then executing these obligations through secondary legislation. Although these treaties do not have monitoring mechanisms it may not be presumptuous to assume that in these circumstances a supervisory body would examine the EU directly as well as the Member States, since the latter would merely be executing EU legislation.

We argue that systematic engagement of the EU by those monitoring bodies which supervise the Member States (until such time that the EU accedes to these treaties in its own right) provides the best solution to ensuring consistency between the Union method of guaranteeing human rights and that existing in international human rights law. In this vein the EU Network of Independent Experts on Fundamental Rights proposed that 'in the fields which belong to the competences shared between the Union and the Member States, the Union could consider contributing to the preparation of the reports which the States must submit periodically to the committees created by the six main treaties of the United Nations in the field of human rights. The preparation of a report concerning specifically the contribution of the European Union to the implementation of the provisions contained in those treaties would present major advantages.' The group of experts went on to note that the very act of compiling such a report would create an important consciousness within the EU of the extent to which its existing competences may be used to give effect to human rights guarantees, as well as the degree to which it currently has an impact on human rights standards. This in turn could lead to more human-rights-aware policy formulation, in particular one which takes full account of the recommendations of the monitoring bodies, to ensure that the obligations the Member States incur through the EU facilitate and do not conflict with those they have incurred under these treaties.¹⁶⁰ The final section will now consider how international human rights obligations could be translated into EU policy.

IV. The Impact of Positive Obligations on the EU

As noted above, any flirtation between the EU and human rights law betrays a certain shyness. When discussing the general principles, accession to the European

the Civil Aspects of International Child Abduction (reprinted in Hague Conference on Private International Law, Collection of Conventions (1951–2003), (2003), No 28), to which all or most Member States were also party. For discussion of how the Regulation compares to the 1996 and 1980 Hague Conventions, see Commission Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, COM(2002) 222 final/2, 2002/0110 (CNS), 17/5/02. The Member States are authorized to make arrangements for seafarers in accordance with ILO Convention 185 in Annex VII, Section 3 of Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders ([2006] OJ L105/1 (13.04.06)).

¹⁶⁰ EU Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the Union in 2003, January 2004, p 21.

Convention on Human Rights or adoption of the Charter of Fundamental Rights, the EU institutions are quick to underline that the affair will do nothing to extend the existing competences of the Union. It is obviously a major concern that accepting or drawing on human rights as embodied in the treaties referred to above may lead the EU to act beyond its already wide powers. We now move to more detailed consideration of the nature of the positive obligations that international human rights law may impose on the EU to provide reassurance that while human rights law may bring about a change in the EU it will ask nothing of the EU that it cannot already give.¹⁶¹

As noted above, human rights impose on States, as correlative duties, obligations to respect, protect, and fulfil. The latter two may be classed as ‘positive’ obligations since they require the duty-holder to take positive action, rather than merely refrain from acting in such a way as to violate rights. The European Commission acknowledges that such positive obligations are incumbent upon the Union and can be realized within the existing competences of the EU:

The EU’s obligation to respect fundamental rights, including children’s rights, implies not only a general duty to abstain from acts violating these rights, but also to take them into account wherever relevant in the conduct of its own policies under the various legal bases of the Treaties.¹⁶²

The immediate objection that may be raised to this is the need to comply with the requirements of subsidiarity and proportionality. According to these principles, the EU may only act where individual action by the Member States would be insufficient to achieve the particular goal or may conflict with the requirements of the EC Treaty, and action by the Union has clear benefits. Furthermore, where it decides to act, the substance of those measures must be the least burdensome available to achieve the aims of the legislation in terms of the administrative and financial onus on the Member States or private actors. Thus framework directives are to be preferred to detailed directives or regulations.¹⁶³

Such principles may be fully complied with by legislation aiming at protecting or fulfilling human rights. The Commission itself recognized as much in relation to the rights of the child:

[N]otwithstanding the... lack of general competence, various particular competencies under the Treaties do allow [the Union] to take specific positive action to safeguard and promote children’s rights. Any such action needs to respect the principles of subsidiarity and proportionality and must not encroach on the competence of the Member States.

¹⁶¹ In support of this view, see eg J Weiler and P Alston, ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in P Alston (ed), *The EU & Human Rights* (OUP, 1999) 3, 23–24.

¹⁶² Commission Communication, ‘Towards an EU Strategy on the Rights of the Child’, COM(2006) 367 final, 4/7/06, 8.

¹⁶³ See: Article 5 of the EC Treaty; Protocol on the application of the principles of subsidiarity and of proportionality, annexed to the EC Treaty by the Treaty of Amsterdam, para 6; Commission ‘Report on Better Lawmaking 2003’, COM(2003) 770 final.

A number of different instruments and methods can be envisaged, including legislative action, soft-law, financial assistance or political dialogue.¹⁶⁴

Thus through what is labelled ‘mainstreaming’, the Commission acknowledged the cross-cutting nature of human rights and its capacity to take positive action on human rights in the context of all areas of its competence. What this would look like is now examined.

A. Human Rights in Areas of Exclusive Competence

Firstly, subsidiarity and proportionality need only be considered in areas of shared competence. Indeed, Union action is more obviously essential in those policy areas where competence is exclusive to the extent that Member States have lost their authority to act autonomously. For instance, with regard to the right to food guaranteed by the 1966 International Covenant on Economic Social and Cultural Rights (to which all EU Member States are party), the relevant treaty body has stated that the obligation to fulfil the right ‘means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security... [W]hen an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to... [provide] that right directly. This obligation also applies for persons who are victims of natural or other disasters.’¹⁶⁵ Accordingly, to the extent that the EU has exclusive powers in formulating the Common Agricultural Policy, it should formulate policies that not only refrain from violating the right to food and prevent the Member States from doing so, but also create a climate of food security and supply food directly where exceptional circumstances interfere with access to food. The same would hold, for instance, for the adoption of economic sanctions in the framework of trade policy, in which the EU has an exclusive competence. Such sanctions should be carefully framed in order to avoid negative impact on the economic and social rights of the population in the targeted country.¹⁶⁶ Since this is an exclusive competence of the EU,¹⁶⁷ the principles of subsidiarity and proportionality have no role to play: the EU must exercise its powers in this area in a way which is compatible with the requirements of international human rights law.¹⁶⁸

¹⁶⁴ Commission Communication, (n 162 above), 8.

¹⁶⁵ Committee on Economic Social and Cultural Rights, General Comment 12: The Right to Adequate Food, para 15, E/C.12/1999/5. Compilation of General Comments, n 74, above.

¹⁶⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, UN doc. E/1998/22.

¹⁶⁷ Article 254(2)) of the EC Treaty.

¹⁶⁸ For a related example, where the sanctions adopted by the EC were alleged to constitute a violation of the right to property under Article 1 of Additional Protocol No 1 to the European Convention

B. Human Rights in Areas of Shared Competence: The Duty to Protect

In areas of shared competence, it is difficult to assert that obliging the Union to *protect* human rights would violate subsidiarity or proportionality. As discussed above through the cases of *Lingvist* and *Parliament v Council*, it does not seem that the Union is currently under a duty to ensure that its legislation specifies how discretion conferred on the Member States should be exercised to minimize the risk of human rights violations. *Parliament v Council* contains contradictory dicta in this regard, but even where the Court asserts that such a duty does exist, its verification that the Family Reunification Directive provides adequate safeguards remains, at best, superficial. It is our view that the legislator should be placed under a duty to do all that is reasonable to prevent the risk that Member States may use discretion accorded to them under EU law in such a way as to violate human rights standards. Such an approach is consistent with subsidiarity since improved and *ex ante* guidance to the Member States is clearly to be preferred to the risk of the Member States' violations of human rights being the subject of *post hoc* infringement proceedings or litigation before national and European courts. And it conforms to the principle of proportionality since it will only restrict Member State discretion in such a way as to lessen the likelihood of them committing violations. The ECJ already reviews Member State legislation that implements Union law to verify compliance with the general principles of law.¹⁶⁹ However, this review is exercised *post hoc*, subject to the limits of the ECJ's jurisdiction and mostly dependent on the initiative of individual litigants seeking a remedy. This makes for inefficient verification that Member States are implementing EU law in conformity with the requirements of fundamental rights. Rather, imposing an *ex ante* duty on the Union to better delineate the discretion of Member States, thus decreasing the possibility of violations, offers individuals legal certainty and better protection of their rights as well as uniformity in the implementation of EU law. This is not to say that the EU should be at fault if ever a Member State interprets its discretion in a way that allows it to violate human rights standards, but this does not prevent the ECJ from developing an approach

of Human Rights, see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, Eur Ct HR (GC), judgment of 30 June 2005, Application no 45036/98.

¹⁶⁹ This concerns not only the provisions of the Charter of Fundamental Rights (Article 51(1) of the Charter), but also the fundamental rights which are part of the general principles of Union law and the respect of which the ECJ controls on the basis of Article 220 of the EC Treaty, in all situations where the Member States implement European law (see, eg, the judgment of 13 July 1989 in Case 5/88 *H Wachauf* [1989] ECR 2609 (Recital 19); or the judgment of 3 December 1992 in Case C-97/91 *O Borelli SpA* [1992] ECR 6313 (Recitals 14 and 15)), where they make use of an exception provided by the treaties (judgment of 28 October 1975, Case 36/75 *Rutili* [1975] ECR 1219 (Recital 32); judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925 (Recital 43)) or by the case law of the ECJ (judgment of 26 June 1997, Case C-368/95 *Familiapress* [1997] ECR I-3689 (Recitals 18 and 19); judgment of 12 June 2003, Case C-112/00, *Schmidberger*, Recitals 71 to 78)).

that tests whether legislation makes a reasonable effort to expressly pre-empt such a situation. In setting out the parameters of Member State discretion the legislator should, of course, draw on the standards referred to above, elaborated in human rights treaties to which some or all of its Member States are party, as well as the interpretations given to these treaties by their supervisory bodies. To an extent this is envisaged by the Memorandum of Understanding between the EU and the Council of Europe. But this practice should become the general rule, and be extended to include human rights treaties elaborated under the auspices of the UN and the ILO.

C. Human Rights in Areas of Shared Competence: The Duty to Fulfil

In areas of shared competence, it is quite easy to envisage the Union taking action to *fulfil* human rights without breaching the requirements of subsidiarity and proportionality. For instance, Articles 136 and 137 of the EC Treaty grant the Union certain powers in relation to employment policy. This area of competence clearly overlaps with the right to work contained in the ICESCR. The right to work does not entail an unconditional entitlement to gainful employment. Rather it establishes certain forms of protection for individuals who are in employment or have left employment, and obligations to promote entry into employment.¹⁷⁰ Under Article 137(2)(b) of the EC Treaty, the Union is empowered to adopt 'minimum requirements for gradual implementation' of rules relating to the labour market, such as the 'information and consultation of workers' (Article 137(1)(e)). Where it decides to adopt secondary legislation under this provision the EU could thus implement the obligation to fulfil the right to work which includes the obligation to undertake 'educational and informational programs to instill public awareness on the right to work'.¹⁷¹ Similarly, the Union may also adopt minimum requirements relating to 'the integration of persons excluded from the labour market' (Article 137(1)(h)), and in this vein the right to work requires the adoption of measures to counter unemployment, including technical and vocational education to facilitate access to the employment market.¹⁷² Thus where the Union decides to exercise its competence in a given area, it should ensure that it is exercised in such a way as to give maximum benefit to human rights promotion. It is not being argued that wherever the Community has shared competence it must act immediately with the aim of promoting human rights. Rather we argue that if the Community decides to act in an area of shared competence and determines that its proposed measures satisfy the tests of subsidiarity and proportionality it is

¹⁷⁰ See UN Committee on Economic, Social and Cultural Rights, General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights), adopted on 24 November 2005, UN doc E/C.12/GC/18.

¹⁷¹ General Comment, para 28.

¹⁷² General Comment, paras 26–27.

difficult to see how integrating additional measures promotional of human rights could be objectionable.

D. The Need to Catalogue Competences

If one is to give effect to the proposition that the Union should protect and fulfil human rights, in addition to respecting them, when it exercises its powers this necessitates the cataloguing of Union competences and their relationship to Member States' human rights obligations. The Commission acknowledged this in relation to establishing a coherent approach to the rights of indigenous people noting the need for 'a systematic appraisal, firstly, of the large range of activities where concern for indigenous peoples is already taken into account, and secondly, of those activities which may have a potential impact on this group'.¹⁷³ The EU Fundamental Rights Agency is ideally placed to undertake a cataloguing of competences and their potential both to conflict with and fulfil particular human rights. This would provide the legislator with a systematic reference point when formulating and considering proposals. Such a competences/human rights database could supplement the Commission guidelines on verifying compliance of its proposals with the Charter of Fundamental Rights (noted in the Introduction). It would avoid the use of superficial and general statements that appear in preambular paragraphs of legislation, merely asserting compliance with human rights and encourage legislators to be more precise in their identification of the requirements of human rights.¹⁷⁴ Furthermore, the Union could provide for systematic follow-up of legislation with a view to its revision where, for instance, it is clear that the Member States are abusing the discretion given to them for interpretation or implementation.¹⁷⁵

¹⁷³ Report from the Commission, 'Review of Progress of Working with Indigenous Peoples', COM(2002) 291 final, 11/6/02, 4.

¹⁷⁴ This would imply for instance that a directive on the right to family reunification restate the relevant norms of the international law of human rights in this field, defining clearly which limits the States may not ignore in the implementation of the directive; or that a directive on assistance in cases of transit for the purposes of removal by air makes explicit the exceptions to the obligation to assist imposed on the State of transit in such cases, which are imposed by the obligation for that State to respect internationally recognized human rights, including the interpretation thereof, for instance by the UN Committee Against Torture; or that the Working Time Directive details the rules which follow from the reading by the European Committee on Social Rights of the European Social Charter.

¹⁷⁵ See, eg, Article 17 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, (19.07.2000); Article 19 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (02.12.2000); Article 17 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (31.05.01); Article 34(2) of the Framework Decision of the Council 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (18.07.02); Article 33 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (23.11.95); or Article

V. Conclusion

In this article, we have presented the case for reinforcing the links between the EU and international human rights law. While the ECJ ensures that the Union does not violate human rights through its actions, its approach has several shortcomings. The focus has been almost exclusively on the European Convention on Human Rights, ignoring the range of other human rights treaties to which all or some of the Member States are party. This has led the Union to be estranged from the universal human rights regimes established under the UN as well as other regional instruments. In consequence, the Union recognizes neither the range of rights nor the interpretation of rights accepted by its Member States (as well as significant numbers of third States) under these treaties. This has also led to a failure to understand the true nature of human rights as imposing positive as well as negative obligations. The reluctance of the EU to commit to international human rights standards may result in several negative consequences. First, where Member States attempt to implement their human rights obligations this may conflict with Union law. Permitting Member States human rights exceptions threatens the uniformity of EU law, which is more pronounced in relation to those treaties to which only some of the Member States are party. Second, Article 307 of the EC Treaty requires Member States to eliminate inconsistencies between pre-existing treaties with third States and EU law, which includes the denunciation of such treaties. This is not only politically embarrassing, but potentially illegal under international law. In this dysfunctional relationship between the EU and human rights, it is the individual that will suffer as human rights standards are lowered and legal uncertainty prevails.

We argue that the EU should embrace international human rights law by taking full advantage of the existing opportunities to join human rights treaties and collaborating with the monitoring bodies of those treaties to which its Member States are party. It has offered some small tokens of commitment to human rights through its collaboration with the UN High Commissioner for Refugees and by authorizing the Member States to ratify certain treaties on its behalf. We call for the systematization of such practices so that the EU may be guided directly by the recommendations and findings of the monitoring bodies that supervise the Member States. If the EU opens itself to international human rights law, it will realize the potential of its legislative and judicial role in protecting and promoting human rights beyond merely ensuring that these rights are respected. This is not to say that the EU can or should be transferred further competences allowing it to develop a full-fledged 'human rights policy'. Such a proposal would not

15 of the new instrument proposed in the Commission proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to, and the provision of, goods and services, COM(2003)657 final.

only be politically infeasible. It would also be based on a misconception about which function human rights fulfil in a legal order: human rights are not a policy domain separate from the others, but a set of requirements which cut across all policy domains, and should guide the exercise of their powers by the public authorities whenever they act or have the competence to act. For now, we need to ensure that the powers that do exist in different policy areas are exercised in such a way as to respect, protect, and fulfil human rights. In this the legislator as well as the ECJ and the Fundamental Rights Agency have an important role. Both the legitimacy of the Union and its effectiveness will improve by moving in this direction.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.